The Law Commission

Working Paper No. 94

Trusts of Land

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THE LAW COMMISSION

WORKING PAPER NO. 94

TRUSTS OF LAND

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SUMMARY

In this Working Paper, the Law Commission examines, as part of its programme for the simplification of conveyancing, the law relating to trusts of land. The paper presents five possible reforms: that there should be a new trust of land with a power of sale; that all settled land should be converted into land held under trusts for sale; that the Settled Land Act should only apply if it is expressed to so so; that there should be a new form of co-ownership which does not involve a trust for sale; and a series of miscelleanous minor reforms. The Law Commission provisionally recommends the first of these, but the purpose of the paper is to obtain the widest possible range of views on all of them.

TRUSTS OF LAND

Introduction

1.1 Ever since the reforms of property law in the 1920's, there have been suggestions as to how those reforms should themselves be reformed.[1] As part of its programme for the simplification of conveyancing and as a result of a recommendation of the Government's Committee on Conveyancing, the Law Commission has prepared this paper, which it hopes will provide a focus for discussion of reform in the area of trusts of land. The views expressed here are not the final views of the Law Commission. We hope that there will be detailed and widespread discussion both of our proposals and of any others that may be put forward.

1.2 The scope of this paper is wide. One of the notable features of English land law is the way in which a wide variety of different interests can be created in one piece of land, and those interests are themselves treated as property. Among the most usual interests which people wish to create are concurrent interests, where two or more people hold interests in land together, and successive interests, where land is given to one person during his or her lifetime and thereafter to another. At present such interests are created under the Settled Land Act 1925 or the Law of Property Act 1925, part of which is concerned with trusts for sale. We shall be looking both at the present structures within which successive and concurrent interests are created and at some other possible structures which might offer advantages over the present system.

1.3 This paper does not follow the usual Law Commission pattern of setting out the existing law in detail. The law on settled land and on trusts for sale is more than adequately dealt with in existing legal writings. The following paragraphs contain a brief account of the present

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1 See Appendix A for a list of books and articles consulted.

system, but while we still explain particular points when necessary to the discussion, for a general account of the law we refer the reader to the standard textbooks.[2] Some sections of statutes referred to in the discussion are set out in full at Appendix B.

Historical aspects

1.4 In considering possible reforms of this area of law it is important not to lose sight of the reasons why the law is in its present form. This is not the place for a lengthy historical account.[3] However, there are certain problems which the present legislation attempted to deal with and it is necessary to note these, to ensure that any reform does not inadvertently give rise to them again.

1.5 The wish to tie up one's property for more than one generation has always been a common one. However, it became apparent in the nineteenth century that settlements were causing major difficulties. If the interest in land were split between the tenant for life and remaindermen, then it was sometimes extremely difficult for any part of the land to be sold or otherwise dealt with. This had serious implications for the economic use and development of land. The solution adopted in the nineteenth century, and followed in the Settled Land Act 1925, was to give increased powers of disposition and management to the tenant for life. His position was further strengthened by the Law of Property Act 1925, when the future interests of the remaindermen were made equitable only, and the tenant for life was given power to convey the legal fee simple in the land. It is important that any reform should retain the advantage of the present system, that there is always someone who can deal with the land.

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2 Megarry and Wade, The Law of Real Property, 5th ed., 1984; pp. 311-464, Cheshire & Burn's Modern Law of Real Property, 13th ed., 1982, pp. 165-357.

3 For a brief historical account see Cheshire and Burn, ibid, pp. 69-80. For more detail see Simpson, An Introduction to the History of the Land Law.

The Present System

2.1 At present there are two possible ways of creating successive interests in land, and one of creating concurrent interests. Where successive interests are concerned, whichever system is used, the beneficial interests of the life tenant and the remainderman are equitable only.[4] The difference between the two systems lies principally in how the legal estate is held and who has the powers of management. Where successive interests are created under the Settled Land Act 1925, the tenant for life has a beneficial life interest. However, for the purposes of dealing with the land he also holds the legal estate.[5] He has wide powers of management. A purchaser will be able to acquire a legal fee simple absolute from the tenant for life free from the equitable interests created by the settlement provided that the purchaser pays the purchase money to at least two trustees or to a trust Corporation. Where successive interests are created behind a trust for sale, the legal estate is held by the trustees, and generally it is they who have the powers of management. A purchaser will be able to acquire the legal estate free from the equitable interest from the trustees by paying the purchase money to the trustees.

2.2 Concurrent interests in land usually exist behind a trust for sale.[6] The only permitted concurrent interest in the legal estate is a joint tenancy. Legal tenancies in common were abolished by s.34 of the Law of Property Act 1925. Therefore the effect of a conveyance to two or more people as beneficial joint tenants is that they hold the legal estate as joint tenants on trust for sale, for themselves as beneficial joint

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4 Law of Property Act 1925, s.1.

5 This is not so if he is an infant, or in some other way incapacitated, when there are complex provisions as to who should exercise the powers of the tenant for life.

6 Law of Property Act 1925, ss.34-36. Where land is settled under the Settled Land Act 1925 and there are joint tenants for life, there will be no trust for sale.

tenants, and the effect of a conveyance to two or more people as tenants in common is that they too hold the legal estate as joint tenants on trust for sale, but for themselves as tenants in common.

An Outline of the Problems

3.1 Before looking at proposals for reform it is clearly important to establish what problems exist. The following paragraphs describe problems which have become apparent through the case law or have been discussed in the academic literature. It may well be that we have failed to identify all the problems, and we would be very glad to hear of others. Quite apart from the specific problems, it is now sixty years since there was last substantial legislation in this area, and as many of the provisions then were consolidating ones, much of the law dates back a hundred years or more. That alone, of course, is not an argument for change, but it is an argument for a re-examination of the law, not least because the social circumstances surrounding property ownership have changed greatly in the last forty years. It is only the problems that are discussed here. Possible solutions are considered later in the paper.

A. Dual system

3.2 The following problems are those that arise because, at present, successive interests in land can be created either as settled land under the Settled Land Act 1925 or as interests behind a trust for sale. It has often been suggested that a dual system is unnecessary and that one system for successive interests would be sufficient. Originally the two systems performed different functions.[7] The strict settlement, using combinations of life interests and entailed interests (which before 1926 could exist as legal estates), was intended to keep land within the ownership of a particular family. In many cases the tenant for life would occupy the land. The trust for sale was used either where a sale was

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7 For a full historical account see Simpson, An Introduction to the History of the Land Law, 1961 pp. 188-194, 218-224.

actually intended, or where the land concerned was intended to be an investment, to be bought and sold as market conditions demanded, the tenant for life being paid the income from it. By the mid-19th century it was apparent that strict settlements caused difficulty in that, if the settlement was not well drafted, the powers of the tenant for life were too limited to enable the land to be managed properly, and however the settlement was drafted, sale of the land was extremely difficult as no person had the power to convey the fee simple. A series of reforming statutes culminating in the Settled Land Act 1925 increased the powers of the tenant for life and ensured that there was also some person able to convey the fee simple in the land. At the same time the Law of Property Act 1925, s.1 prevented life interests from existing as legal estates, so that all settlements had to take effect behind a trust. The effect of these reforms has been to remove many of the differences between the two systems of settlement. In either system the land can be sold and the strict settlement is no longer an effective method of keeping land in the family. The remaining differences centre on who makes the decisions with respect to the land. It is arguable that the differences are not sufficient to justify the continuing existence of two systems.

3.3 Priority given to settled land. The legislation is so phrased that when successive interests are created, a trust for sale must be expressly adopted (except where imposed by statute); otherwise the Settled Land Act will apply. This means that where trusts of land are created without proper advice it is almost certain that the land will be settled. This is most likely to occur where wills are, as often happens drawn up without advice. In some cases this will be what the testator would have wanted, but in many cases it will not be and additional expense for the beneficiaries may result because additional documents and a different form of probate are required. If an inadvertent settlement is created by will and the executors do not realise this, problems may be caused for purchasers (see below).

3.4 Definition of trust for sale. Inadvertent settlements may arise not through failure to decide which is required but through failure to create a valid trust for sale. The definition of a trust for sale as an immediate binding trust for sale has been criticised.[8] As a definition it is poor because it defines a thing as a particular kind of that thing. The word "binding" has caused particular problems because a trust should be binding anyway and the courts have considered that it must mean something other than the trustees being under a duty to sell.[9]

3.5 Rights of residence. In other cases, settled land has been created inadvertently because a right of residence has been conferred on a person for his or her lifetime. It is not entirely clear that the conferment of such a right was intended to be sufficient to bring the land within the Settled Land Act. The technical question to be decided was whether land "stands for the time being limited in trust for any persons by way of succession".[10] However the courts have made it clear that they will treat such land as settled land especially if there is no other way to protect the rights of the life resident.[11] Giving such a person all the powers of disposition and management of a tenant for life has been much criticised. There should be some provision for giving rights of residence during a person's lifetime which do not cause technical complications. This problem is discussed further below[12].

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8 Law of Property Act 1925, s.205(1)(xxix), and see Megarry and Wade, The Law of Real Property, 5th ed., 1984, pp. 386-388.

9 Re Parker's Settled Estates [1928] Ch. 247, Re Ryder and Steadman's Contract [1927] 2 Ch. 62, Re Norton [1929] 1 Ch. 84, Re Beamount Settled Estates [1937] 2 All E.R. 353, Re Sharpe's Deed of Release [1939] Ch. 51.

10 Settled Land Act 1925, s.1(1).

11 Re Duce and Boots Cash Chemists (Southern) Ltd [1937] Ch.642, Bannister v. Bannister [1948] 2 All E.R. 133, Binions v. Evans [1972] Ch. 359.

12 See para. 16.16.

B. Making good title

3.6 If a purchaser of land subject to a trust for sale fails to comply with the provisions of s.27 of the Law of Property Act 1925, which states that the purchase price must be paid to at least two trustees (or a trust corporation) the conveyance will not be void, although interests under the trust for sale will not be overreached. If a purchaser of settled land fails to comply with the provisions of s.18 of the Settled Land Act 1925, the conveyance will be void except in so far as it binds the beneficial interest of the tenant for life. In some circumstances a purchaser may be protected by s.110 of the Settled Land Act, which is discussed in the following paragraph. It is questionable whether it is necessary for the position of a purchaser to vary in this way.

3.7 The drafting of s.110 of the Settled Land Act 1925 has led to the suggestion that it fails to give purchasers enough protection and that they may have to examine the trust instrument themselves, contrary to the general principles of the Settled Land Act 1925. This is probably a theoretical problem rather than a practical one. A real problem that has arisen is the relationship between s.110 and s.18 of the Act. Section 110 is meant to give some protection to a purchaser if he buys in good faith, but under s.18, if land is settled land, then any unauthorised disposition is void. It is not certain which prevails, nor is it clear whether s.110 offers any protection where the purchaser does not know that he is dealing with the tenant for life.[13]

3.8 Where settled land is created by will (particularly a home-made one) it is easy for the executors not to realise this and they may, for example, vest the land in trustees rather than in the tenant for life. It may then be difficult for either the tenant for life or the trustees or their successors to make a good title to a later purchaser.[14]

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13 Compare Weston v. Henshaw [1950] Ch. 510 with Re Morgan's Lease [1972] Ch. 1.

14 As, for example, in Re Duce and Boots Cash Chemists (Southern) Ltd [1937] Ch. 642.

3.9 There is no formal provision for the termination of a trust for sale. This means that purchasers of land which has been subject to a trust for sale may be put in the position of having to investigate the trusts in order to ascertain that the trust for sale has ended.[15]

C. Control by beneficiaries

3.10 In general the beneficiaries of a trust of land are treated no differently from the beneficiaries of a trust of any other kind of property. This may, itself, be the cause of some problems. Land is not like most other kinds of property; each piece is, in principle, unique, and, more importantly, it may be the place where the beneficiaries live, or want to live in the future. Questions of control over the land are therefore particularly important.

3.11 Those entitled to settled land in remainder. It is impossible for a remainderman to prevent the sale of the land, unless there is lack of good faith on the part of the tenant for life. This leaves the remainderman in a very weak position because the land may have already been sold before he becomes aware of the tenant for life's intention to sell.[16]

3.12 Duty to consult. The trustees of land held on a statutory trust for sale[17] have a duty to consult the beneficiaries.[18] There is no such duty where express trusts for sale are concerned. Even as regards statutory trusts the provision is weak. It only applies "so far as is

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15 Except where joint tenants were holding on trust for themselves and there is only one survivor, Law of Property (Joint Tenants) Act 1964.

16 See, for example, England v. Public Trustee (1967) 112 S.J. 70.

17 See para. 2.2.

18 Law of Property Act 1925, s.26. (3) substituted by the Law of Property (Amendment) Act 1926, Sched.

practicable." The trustees only have to give effect to the wishes of the beneficiaries "so far as consistent with the general interest of the trust" and a purchaser is not affected by the trustees' failure to carry out or comply with the result of any consultation.

3.13 Delegation. It has been suggested that the power to delegate the management of land to a tenant for life of land held on trust for sale is inadequate. If the power to delegate is not exercised, the tenant for life is left with no control, which, may be unsatisfactory if the trust for sale is being used as a substitute for settled land. If the power is exercised, ownership and management are separated which may be undesirable. The trustees retain the legal interest. If the tenant for life is not in possession, he may not be able to bring an action in his own name to protect the reversion of any property leased. As he is not the covenantee, he cannot sue on the covenants in the lease. It may be that these difficulties do not cause problems in practice as the trustees always take appropriate action, but, in theory at least, they do exist. We would be interested to hear from those with practical experience of this area. In addition it has been said,[19] "Psychologically in the management of a country estate this duty to act in the name of another seems unsound". Whether this is true today seems less likely. Ownership and management are commonly separated, for example, in limited companies and we doubt that there is any general issue of principle at stake. Making trustees delegate certain powers in certain situations would minimise the difference between the two systems.

3.14 Sale subject to consent. In settled land it is not possible to make the sale of the land or the exercise of other powers subject to the consent of some other person,[20] for example, a remainderman. Making

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19 Potter, Strict Settlement and Trust for Sale, (1944) 8 Conv. (N.S.) 147, 157.

20 Settled Land Act 1925, s.106.

the consent of a beneficiary necessary for the sale of land held on trust for sale does not seem to have caused any problems and a similar provision could be made for settled land.

D. Specific Settled Land Act problems

3.15 Complexity. Perhaps the greatest difficulty of the Settled Land Act 1925 is its sheer complexity. Three different aspects will serve to illustrate this.

(i) The Act always requires the use of at least two documents, the vesting deed which vests the legal estate in the tenant for life (or whoever is entitled to exercise his powers) and the trust instrument which declares the trusts.[21] If land is acquired after the settlement has been created, a subsidiary vesting deed must be executed vesting the land in the tenant for life (or whoever is entitled to exercise his powers).[22] Hence where there are frequent purchases of land for a settlement, there may be a considerable number of vesting deeds. There are no equivalent provisions for trusts for sale. The deed which vests the land in trustees for sale may also declare the trusts, or there may be two separate documents where that is convenient.[23]

(ii) The Settled Land Act 1925 does not only provide for the straightforward settlement of a life interest followed by interests in remainder. It also covers a wide range of conditional interests and determinable fees, and land

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21 Settled Land Act 1925 ss. 4, 5.

22 Ibid., s.10.

23 Law of Property Act 1925, s.27(1): the purchaser is not concerned with the trusts.

conveyed to infants. Here, there is no tenant for life in the proper sense and the Act has to make elaborate provisions giving certain people all the powers of the tenant for life.[24]

(iii) Because the Act applies in certain circumstances without this being appreciated by the settlor, it can happen that no trustees are appointed by him. Thus a simple gift of land to X for life remainder to Y creates a settlement and it is necessary for trustees to be appointed. Again this necessitates complex provisions as to who are to be the trustees where none are appointed.[25]

3.16 Conflict of interest. It has been suggested that there is an inherent conflict involved in the position of the tenant for life. The legal estate and all the powers of dealing with it are vested in him and under s.16 of the Settled Land Act 1925 he is a trustee. Yet he is, at the same time, the principal beneficiary. While it is quite usual for a trustee to be a beneficiary, given the lack of any other restraints on the tenant's powers, the conflict may become real. It seems that where there is a conflict of interests, the tenant for life is not treated like an ordinary trustee. It has been held that the court will not intervene if the tenant for life allows the estate to become derelict, but only if there is evidence that he has refused to exercise his powers.[26] Thus the remaindermen may inherit an estate much diminished in value and have no remedy. Similarly the interests of the remaindermen may be adversely affected by a sale of the settled land at a low price. Again, they may have no

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24 Settled Land Act 1925, ss.20-24.

25 Settled Land Act 1925, ss. 30-34.

26 Re Thornhill's Settlement [1941] Ch. 24.

effective remedy[27] as they may not discover the sale until years after it took place and, even if they could establish a breach of trust, the tenant for life may be dead and his estate not worth suing. While it is clear that the courts, recognising the risks arising from conflicts of interest, usually make the purchase of trust property by a trustee virtually impossible,[28] in one case where the tenant for life purchased the settled land without the proper procedure being adopted, the sale was simply allowed to stand.[29]

E. Trust for sale - specific problems

3.17 Co-ownership. The Law of Property Act 1925 imposes a statutory trust for sale wherever land is conveyed to co-owners - whether in equity they are joint tenants or tenants in common.[30] Thus, wherever a couple buy a house, they become trustees for sale of it although a sale is probably not what they intend. In 1925, owner-occupation of dwellings was far less usual, than nowadays, and where it did exist, it was less likely that a house would be purchased in joint names.[31] The co-ownership envisaged by the Law of Property Act would have arisen in a different context, where, for example, property was left to children in equal shares. In such a case, a sale at some stage was likely. As far as co-ownership is concerned, a system devised for one set of social circumstances is being used for very different circumstances.

3.18 The doctrine of conversion. The doctrine of conversion states that where land is held on trust for sale, the interests of the beneficiaries are deemed to be interests in the proceeds of sale, even before before the

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27 England v. Public Trustee (1967) 112 S.J.70.

28 Pettitt, Equity and the Law of Trusts, 5th ed., 1984,pp 374-376.

29 Re Pennant's Will Trusts [1970] Ch. 75.

30 Law of Property Act 1925, ss.34, 36.

31 Co-ownership arises when two or more people rent property, as would have been more usual in 1925, but most of the problems seem to occur when the co-owners own the fee simple or a long lease.

land has been sold. The doctrine developed during the 18th century.[32] In the early cases, the nature of the beneficial interests was in question because the law of inheritance differed depending on whether property was real or personal. The doctrine of conversion meant that land held on trust for sale devolved as personalty. When reform of land law was being considered, it was the doctrine of conversion that made the trust for sale a useful tool in the simplification of conveyancing: since the interests were not in the land anyway, it was easy to provide that a purchaser should take free of them.[33] Now, however, the doctrine of conversion causes problems. To say that a person with an equitable joint tenancy or an equitable tenancy in common has no interest in the house but only an interest in the proceeds of sale, when no sale is contemplated, is wholly artificial. The courts have refused to allow the doctrine of conversion to operate fully in some cases.[34] The position therefore now is that the doctrine of conversion applies for some purposes but not for others, depending on the particular circumstances. This is clearly unsatisfactory.

3.19 Powers conferred by s.30 of the Law of Property Act 1925. Problems have arisen with s.30 of the Law of Property Act 1925 as to who can apply, under the section the extent of the powers of the court and the factors to be taken into account in exercising the court's discretion. On the face of it, the section only enables an application to be made if the trustee is refusing to sell. However the courts have found ways of protecting beneficiaries who wish to prevent a sale.[35] It also appears

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32 Lightwood, 'Trusts for Sale,' (1927) 3 C.L.J.59.

33 See Fourth Report of the Acquisition and Valuation of Land Committee, Cmd. 424, 1919, especially Appendix IV Part I, the Memorandum by B.L. Cherry.

34 e.g. Williams & Glyn's Bank v. Boland [1981] A.C. 487.

35 See, e.g. Bull v. Bull [1955] 1 Q.B. 234.

that a trustee who has no beneficial interest in the land may be unable to apply, so that the section does not provide a remedy where the trustees cannot agree to a sale.[36]

3.20 While the court is given power to make such order as it thinks fit, it is not certain whether this extends to ordering one co-owner who has sole occupation to pay an occupation rent to the other who is not in occupation.[37] It is probably desirable that they should have power to do so, as this provides a possible solution to the problem that where a sale is refused because of the wishes of one co-owner, the other is deprived of a valuable financial asset.

3.21 A considerable amount of case law exists as to how the discretion should be exercised. Generally the court will look at the purpose for which the trust was created, and see whether the purpose still exists.[38] Particular difficulties have arisen as to the weight to be given to the children's interests,[39] and where one co-owner is bankrupt.[40]

3.22 Occupation right. It is not clear whether a tenancy in common confers on beneficiaries as against trustees a right to occupy the land.[41]

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36 See Law Reform Committee, 23rd Report, para. 3.63.

37 See further para. 8.10.

38 Re Buchanan-Wollaston's Conveyance [1939] Ch. 738, Bull v. Bull [1955] 1 Q.B. 234, Barclay v. Barclay [1970] 2 Q.B. 677.

39 Compare Rawlings v. Rawlings [1964] P. 398, 419 and Burke v. Burke [1974] 1 W.L.R. 1063, 1067.

40 Re Holliday [1981] Ch. 405, Re Lowrie [1981] 3 All E.R. 353, and see n. 113.

41 It was accepted in Bull v. Bull [1955] 1 Q.B. 234 that they did have a right of occupation but this has been criticised. See Crane (1955) -19 Conv. (N.S.) 146. In Williams & Glyns Bank v. Boland [1981] A.C. 487 Lord Wilberforce noted Denning L.J.'s view in Bull v. Bull with approval.

3.23 Creation of tenancy in common. It has been suggested that a tenancy in common cannot be created informally by, e.g. financial contributions, because s.34(1) of the Law of Property Act states that undivided shares can only be created "as provided by the Settled Land Act 1925 or as hereinafter mentioned". The Settled Land Act 1925, s.36(4) states that undivided shares can only be created under a trust instrument or under the Law of Property Act 1925. This means that only expressly created or statutorily imposed undivided shares can exist. However, the courts seem to have accepted the existence of informally created tenancies in common behind a trust for sale.[42] The position could be clarified by statute.

3.24 Severance. The inclusion of a reference in s.36(2) of the Law of Property Act 1925 to severing by methods which, before 1926, would have severed a joint tenancy of personal estate has been a source of some confusion, and, as time goes by, it is increasingly undesirable to have to refer to pre-1926 law. A more detailed discussion of the problems of severance will be found at para. 16.11.

3.25 Ascertaining the equitable interests. A question which has come before the courts on more than one occasion arises when a house has been purchased in joint names and the purchasers have failed to make an express declaration as to the nature or extent of the beneficial interests. It is then left to the courts to investigate this, perhaps years after the conveyance took place. The principles involved in making such decisions are by no means clear. This problem is considered further at para. 16.5.

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42 See further para. 6.5.

F. Powers of trustees

3.26 The Law Reform Committee has already discussed some problems relating to the powers of trustees of land and of the tenant for life.[43] These are discussed below in the context of our fifth proposal. Two further problems which should be mentioned are:-

(i) Power to mortgage. Where land is held by co-owners, there is generally a trust for sale. Trustees for sale have the powers of a tenant for life under the Settled Land Act. As such, they cannot raise the initial purchase price by mortgage.[44] This probably does not matter often, because the co-owners as beneficiaries are unlikely to object, and mortgagees do not in practice do so. However, it is one more illustration of the difficulties caused by using an inappropriate structure for co-ownership.

(ii) Power to appoint attorney. Since co-owners are trustees for sale, if there are only two co-owners (as is usually the case) one cannot appoint the other as his or her attorney.[45] This causes inconvenience and expense, as a third party must be involved. In addition trustees should use a special trustee form of attorney rather than the general one, and failure to use the right form may delay or invalidate a transaction.[46]

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43 Law Reform Committee, 23rd Report, Powers and Duties of Trustees, Cmnd. 8733.

44 See Emmet on Title, 18th ed., p. 322.

45 Trustee Act 1925, s.25(2), as substituted by Powers of Attorney Act 1971, s.9(2).

46 Walia v. Michael Naughton Ltd, The Times, 1 December, 1984.

G. Bare trusts

3.27 Generally, where two or more people hold interests in land, then either the Settled Land Act will apply or there will be a trust for sale. However, a bare trust is within neither system, and so is to some extent an anomaly. A bare trust exists when the entire beneficial interest is vested in one person and the legal estate in another. The trustee in such a case has no duties other than to obey the beneficial owner, who is, to all intent, the real owner. Such a trust may arise, for example, because land held on trust for several beneficiaries has become vested in one adult beneficiary, or because land is being held by a nominee. A more frequent situation which may involve a bare trust arises where the property of any unincorporated association is held on trust for its members by trustees.[47] Generally bare trusts do not cause problems for purchasers, because either the purchaser is aware of the equitable interest and investigates to ensure the sale is with the consent of the beneficial owners, or he is unaware and takes free of them as a bona fide purchaser of the legal estate for value without notice. However, the overreaching machinery provided by s.2 of the Law of Property Act 1925 does not apply to bare trusts,[48] and there may be situations where a purchaser fails to obtain a good title.

Summary

3.28 It will be seen from the preceding paragraphs that many of the problems spring from the existence of two systems which can each be used for much the same purpose and yet have major differences in the way they operate. Added to this is the preference that the legislation shows for the creation of settled land, so that land may inadvertently come within the Settled Land Act 1925, even though this is inappropriate.

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47 Worthing Rugby Football Club Trustees v. Inland Revenue Commissioners [1985] 1 W.L.R. 409.

48 Except where the bare trust has arisen because a trust for sale has ended and the purchaser buying from trustees for sale can assume the trust continues, Law of Property Act 1925, s.27.

However although it appears at first sight that the legislation governing the two systems covers all possible situations, it has become apparent that this is not so. Bare trusts are not catered for, and lifetime rights of residence have only been made to fit within settled land with difficulty.[49]

The Interests which Any System Must Take into Account

4.1 Before looking at a range of possible reforms, it is important to establish what kinds of interests in land are involved in any proposals for reform. The principal interests may be categorised as follows:

(i) successive interests,

(ii) concurrent interests,

(iii) minors' interests,

(iv) the interests of purchasers,

(v) interests under bare trusts.

We do not consider in detail in this paper the special problems which may arise where land is held by charities or unincorporated associations. The structure of such organisations and the rights and duties of their trustees and members involve questions outside the scope of land law. However land is held on trust by these bodies and where appropriate we do consider the impact of our proposals on them.

4.2 Successive interests. The creation of traditional successive interests (e.g. to F for life to S for life to G in Tail)[50] may be less common now than it was when the 1925 legislation was being considered. Changes in social structure and the impact of taxation have made the creation of some elaborate settlements less attractive. However, straightforward settlements are still much used and it is essential that the

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49 See also as to co-ownership and trusts for sale paras. 6.4 and 6.5 below.

50 Megarry and Wade, The Law of Real Property, 5th ed. 1984 p. 410.

law provides adequately for their creation. Where successive interests are created, the tenant for life and the remainderman both have interests in the land. To some extent, their interests may conflict, as the tenant for life may wish to maximise what he receives, that is, the income, whereas the remainderman is interested in the security and maximisation of the capital which he will eventually receive. Any system must be able to balance these conflicting interests. In addition, the tenant for life, being exclusively entitled to the income, may have a claim to be more closely involved with the management of the property than any other beneficiary of a trust. In making proposals for reform, it is important not to lose sight of one of the main reasons for the present systems within which and no one person has complete control, there is a danger that it will be impossible for anyone to deal with the land effectively. The powers that the tenant for life or the trustees for sale now have avoid this problem, and this advantage must be retained.

4.3 Concurrent interests. Far more usual than successive interests are concurrent interests. Here are two problems. One is to determine the nature and size of the beneficial interest. The other is to provide a means of settling disputes between beneficiaries as to the use of the property, and its disposition whether by sale, lease, mortgage, etc. Any system must ensure that it is possible for a purchaser to know whether or not the persons with whom he is dealing can give him a good title.

4.4 Minors. We do not propose making any alteration in the rule that a minor cannot hold a legal estate in land. It is essential that special consideration should be given to a suitable form of trust of land for minors where a minor has an interest in land and there are neither succcessive nor concurrent interests. In addition, while in general if it is desired to give land to a minor, a trust or settlement will be created, it is necessary to make provision for those occasions where an attempt is made to convey a legal estate in land to a minor.

4.5 Purchasers. An important aim of any reform of this area should be the simplification of conveyancing. Hence the effect of any reform on purchasers is a vital consideration. Because of the need to protect purchasers, while we hope that our review of this area will be wide-ranging, we are not intending to propose any alteration to the fundamental principle of the 1925 property legislation, that there should be only two legal estates in land. We consider that this aspect of the 1925 legislation has worked well, and that other interests should be created in equity behind a trust. From the point of view of purchasers, it is essential that they should be able to establish who has the power to sell and convey the legal title, that they should be able to discover any beneficial interests which cannot be overreached, and that they should be certain that if they pay their money to the proper persons, they will obtain a good title, free from overreachable equitable interests.

4.6 Bare trusts. It is useful in some situations for the legal estate and equitable interest to be separated even though the trustee has none of the usual duties of a trustee. It is important that any proposed change should not make such a separation impossible. It should make provision to ensure that purchasers of such land can obtain a good title free from the equitable interest.

Outline of Proposals for Reform

5.1 The remainder of this paper will present five different approaches to reform in this area. They are not all mutually exclusive - some could be combined. The first, however, is intended to stand alone. It is a proposal for a complete reform of this area involving not only the repeal of the Settled Land Act 1925 but the creation of a new trust of land with a power of sale which would be used for both successive and concurrent interests. The second is the less radical proposal that the Settled Land Act should be repealed, and all successive interests be created behind a trust for sale. The third is a proposal that the Settled Land Act be retained, but the burden of proof shifted so that a settlement

would be assumed to have been created behind a trust for a sale unless specific provision were made that it should not be. The fourth proposal could be combined with either the second or the third, and is that a form of co-ownership should be devised which would not, at least initially, involve a trust at all. The fifth proposal is for a series of individual reforms which resolve particular difficulties in the operation of settled land and trusts for sale without altering the basic structure. These reforms could be combined with any of the previous three.

PROPOSAL I

A New Trust of Land

6.1 If the dual system is regarded as unwieldy, one possible solution is to create a new trust of land. This trust of land would not be a trust for sale. The trustees would hold the land on trust with a power to sell and a power to retain. The trustees would have the legal estate and would be able to convey it to a purchaser free from the equitable interests which arise under the trust.

6.2 The proposed new trust would apply in all the situations where at present land is either settled under the Settled Land Act 1925, or a statutory trust for sale is imposed by the Law of Property Act 1925. It would therefore be possible to repeal both the Settled Land Act and those provisions of the Law of Property Act which relate to statutory or other trusts for sale.

6.3 It is necessary to consider separately each of the situations where under the present law land is either settled or held on trust for sale, to see how the new trust would affect them.

6.4 Co-owners. The automatic imposition of a trust for sale on co-owners who may have purchased the property for their own occupation is highly artificial and difficult to explain to a lay client. As has been said, the structure of co-ownership laid down in 1925 is no longer suitable

for modern conditions. Under this proposal, land held by co-owners would be held on trust, but there would be no duty to sell. Since there is no duty to sell, the doctrine of conversion would not be applicable, as this doctrine depends on there being a duty to sell, with equity assuming that the sale has taken place, even when it has not.

6.5 At present, although it is clear that the 1925 legislation was intended to impose a trust for sale in all cases of beneficial co-ownership, there are some circumstances which it did not expressly cover. These are identified by Megarry and Wade as follows:-[51]

(i) a conveyance to A (an infant) and B (an adult) as tenants in common;

(ii) a conveyance to A and B as joint tenants, where equity requires them to take as beneficial tenants in common, e.g. because they are partners, or contribute purchase-money in unequal shares;

(iii) a conveyance to X purchasing as trustee for A and B who are equitable owners in common of the purchase-money; and

(iv) a declaration by A as sole owner, that he holds on trust for himself and B in equal shares.

In addition the courts have assumed that where land is purchased in the name of one person alone, and another person contributes to the purchase price, the land is held by the sole legal owner on trust for sale for himself and the other person who contributed.[52] We would suggest that clear provision should be made so that wherever concurrent interests in land are created, that land should be held under the new trust.

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51 Megarry and Wade, The Law of Real Property, 5th ed., 1984, p. 438.

52 Bull v. Bull [1955] 1 Q.B. 234, Williams & Glyn's Bank Ltd v. Boland [1981] A.C. 487.

6.6 Minors. At present, land conveyed to a minor is automatically settled land under the Settled Land Act 1925.[53] That Act has never provided a really satisfactory solution to the problem of land being held by a minor. The Act is best suited to the situation where a tenant for life manages the land. Where the tenant for life is a minor, this is impossible, and the Act has to make special provision as to who is to exercise the powers. Normally, the trustees of the settlement hold the legal estate and exercise the powers.[54] Under the new trust, the trustees would hold the land and have the powers of management, and there would be no need for special provision. The proposal would therefore not have a great deal of practical effect where a minor is entitled to land, but it would simplify the present position.

6.7 Successive interests. It is where successive interests have been created that the proposal will make the most difference to the interests of those involved. At present, the legal estate in such cases is generally held by the tenant for life who has all the powers of disposition and management. The trustees play a limited role until the land is actually sold, when the purchase price has to be paid to them. Under the proposal, the legal estate would be held by the trustees who would prima facie have all the powers. The details as to how the interests of the trustees and beneficiaries would be affected are discussed further below.

6.8 Entailed interests. It seems to us that entailed interests, which since 1925 have been able to exist in equity only, are an anachronism. We put forward for consideration the proposition that existing entails could be converted into fee tail estates and the creation of new entailed interests could be forbidden. Entailed interests as at present constituted are in some ways misleading. They give the

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53 The conveyance is treated as a contract to settle the land on the minor, Settled Land Act 1925, s.27.

54 Settled Land Act 1925, s.26.

impression that the land will necessarily be kept in the family, whereas in fact the entail can nearly always be barred. Even if it is not, the tenant intail can sell the land, so that it is only the capital sum which will pass down the family. We are supported in this view by Megarry and Wade who state:-

> Entails might well have been abolished in 1925, along with the old rules of inheritance. They are now little more than a nuisance, accompanied by much intricate law. It is true that entails played an important part in the old-fashioned type of strict settlement. But such settlements are out of favour today, and were not of paramount importance even in 1925. Very similar results can be obtained, if indeed they are desired, by simpler forms of trusts.[55]

6.9 Conditional and determinable fees. The Settled Land Act 1925 includes in its scope land held in fee simple or for a term of years absolute subject to an executory gift over and land held for a base or determinable fee. Under this proposal, the trustees would hold the legal estate in such land and have the powers of disposition and management. In these cases at present the trustees are likely to have little, if any, role and there may well be cases of determinable fees where there are no trustees. So far as existing settlements are concerned, we set out proposals later which should go some way to solving this problem. We consider that such interests are likely in any event to be rare, and the gain, so far as simplification is concerned, from treating them in the same way as other forms of successive interest should not be lost by treating them as a special case.

6.10 Although such interests, according to the Settled Land Act, exist in equity only, the effect of s.7 of the Law of Property Act 1925 (as amended by Law of Property (Amendment) Act 1926) is that a fee simple which is subject to a legal or equitable right of entry or re-entry is a fee simple absolute, and hence a legal estate. Although there does seem to

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55 Megarry and Wade, The Law of Real Property, 5th ed., 1984, p. 1151.

be some conflict between these two Acts, it has always been assumed that the Law of Property Act provision prevails. The Law of Property Act provision was introduced to prevent land subject to a rentcharge from coming within the Settled Land Act. The Rentcharges Act 1977 will eventually (by 2037) abolish all rentcharges except those which come within the Settled Land Act, estate rentcharges, and rentcharges imposed by statute, or by order of the court. Estate rentcharges developed as a way of avoiding some of the difficulties of enforcing positive covenants.[56] Were a comprehensive system of land obligations to be produced, it should be possible to draft a provision to have effect after 2037 so that all conditional and determinable fees would exist only behind a trust.[57] For the present, however, it seems that only those conditional and determinable fees which do not come within s.7 would be able to come within the new trust.

6.11 Family charges. The only reason why land charged, whether voluntarily or in consideration of marriage or by way of family arrangement, with the payment of any sums for the benefit of any person is at present treated as settled land is to provide a convenient way in which the land can be sold and the vendor take free from the charge. It does seem rather complicated to subject the whole of an area of land to a trust when it may be only charged with a relatively small sum. Our proposal would exacerbate this problem, because the whole legal estate would have to be held by trustees. However, this does seem to be the best way of protecting the interest of the person with a family charge, while enabling the land to be sold or otherwise dealt with. It may be that at present trustees are only appointed when the land is to be sold. We would welcome views as to whether it is necessary to impose a trust at all in such cases.

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56 See Law Com. No. 127 for a possible solution to this problem, recommending a new system of land obligations which would include positive covenants and which would be enforceable against successors in title.

57 Save for those which exist under the School Sites Act etc. Implementation of Law Com. No.111 would do much to remove any remaining difficulties with them.

6.12 Charities. By s.29 of the Settled Land Act 1925, all land vested in trustees for charitable, ecclesiastical or public trusts or purposes is deemed to be settled land. The trustees are not to be treated as statutory owners, but do have all the powers of a tenant for life. It is difficult to see the relevance of them not being treated as statutory owners, because the definition of a statutory owner is fundamentally the persons who have the powers of a tenant for life.[58] The trustees were simply to hold the land on trust with the statutory powers which would be provided under this proposal, nothing would be lost. At present, the purchaser must ensure that necessary consents have been obtained -this is an exception to the general principle of the 1925 property legislation that purchasers do not have to look behind the trusts, and we would welcome views as to whether it is necessary.

6.13 Intestacy. At present, land forming part of an intestate's estate is subject to a trust for sale.[59] However, land forming part of a testate estate is not, unless a trust for sale is imposed by the will. Instead, executors are given all the powers of trustees for sale in disposing of or managing the land.[60] Where intestacy is concerned, despite the wording of the statute, it appears that the administrator does not really hold the land on trust for sale because the beneficiaries do not receive a beneficial interest, and that generally the administrator is using the powers under s.39 of the Administration of Estates Act 1925 rather than holding the land on trust for sale under s.33. However, this does not render s.33 totally unnecessary, as the effect of s.33(2) is that undisposed of money is used first to provide for the payment of any pecuniary legacies. There does seem to be some uncertainty as to the precise relationship between the two sections. Nor is it clear whether, at the point that the administrator ceases to deal with the land under s.39 and becomes a trustee under s.33, it is necessary for an assent to be executed.

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58 Settled Land Act 1925, s. 117(1)(xxvi).

59 Administration of Estates Act 1925, s.33.

60 Administration of Estates Act 1925, s.39.

We would suggest that the law in this area would be improved by making it clear at what point the "initial stage" ends and an administrator becomes a trustee, and whether it is necessary to execute an assent.[61] Since we are recommending the abolition of the statutory trust for sale for other purposes, it would create an additional complication if such a trust were to be retained for intestacy only. Is it necessary? Provisionally, we think not. While it is essential that administrators should have a power to sell, there seems no reason why the land should be subjected automatically to a trust for sale. The land could be held on trust with power to sell, and the administrators given all the powers which such trustees would have. Similarly it would be necessary to alter the provision with respect to personal property which at present must also be sold[62] and, again, we see no reason to impose a duty to sell.

6.14 Land held by mortgagees. Where trustees have invested trust money by lending it on mortgage and the mortgaged land becomes vested in them free from the right of redemption, the trustees hold the land upon trust for sale.[63] It is said that this preserves the character of the investment as being one of personalty. However, it is doubtful whether today the difference between the treatment of realty and personalty is sufficient to make this necessary. Therefore, we see no reason why such land should not be held under a trust of land with power to sell.

6.15 Purchase of land with trust funds. Where trustees of personalty or trustees for sale of land invest the trust funds in the purchase of land, at present they hold it on trust for sale.[64] As the main reason for this provision is to prevent the land coming within the Settled Land Act 1925, once that is no longer possible, there should be no objection to such land being held on trust with power to sell.

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61 A paper considering this problem and others relating to title on death is in the course of being prepared.

62 Administration of Estates Act 1925, s.33.

63 Law of Property Act 1925, s.31.

64 Law of Property Act 1925, s.32.

Is an express trust needed?

6.16 Where settled land is concerned, it has been suggested that the phrase "limited in trust" means that there must be an express trust.[65] Likewise, where co-ownership is concerned, it has been suggested that there must be an instrument expressly creating the tenancy in common or joint tenancy.[66] The law in this area is unclear. It would be desirable if it were clarified and if the same rule applied to trusts of land however they arose. We can see no good reason to insist on an express trust. The trust-relationship arises from the situation itself, because, for example, successive interests are necessarily equitable, as are tenancies in common. Accordingly, in some cases, situations are bound to arise where the legal implications of a transaction are not fully understood. This may particularly occur where a matrimonial home is acquired. To require an express trust, or any particular instrument, would, in such circumstances, defeat the purpose of imposing a trust.

Should the express trust for sale be retained?

6.17 Should a settlor be able to impose a duty to sell on the trustees if he wishes to? We would suggest that he should not. If such a duty were to be imposed, the question would then arise as to whether a power to postpone sale should necessarily be implied. Indeed this is the real question at the heart of the consideration of the continuation of the express trust for sale. If a power to postpone is to be implied in every case, we would suggest that there is little practical point in an express trust to sell. Such a trust would have little effect on the trustees' decision to sell or retain and would reintroduce the problems of the doctrine of conversion. If the power to postpone were not to be implied by statute into every such trust, there might be trusts where it was omitted and the trustees were forced into a sale at a time which was

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65 Binions v. Evans [1972] Ch. 359. 366.

66 Rye v. Rye [1962] A.C. 496.

disadvantageous to the beneficiaries. Even the present position, where the power to postpone is implied unless a contrary intention appears is not entirely satisfactory, because the settlor may not realise that certain words he has used can be interpreted to exclude the power and cause problems for the beneficiaries.[67] If our view is not accepted, and express trusts for sale continue to be permitted, we would suggest that, to protect the beneficiaries the power to postpone sale should be implied into every such trust, and the beneficiaries should be considered to have interests in the land unless and until a sale takes place.

Existing settlements and trusts

6.18 When introducing a new system of land holding, one of the most difficult decisions to make is whether it should apply only to future settlements and co-ownership rights, or whether it should apply to all interests that exist when the Act comes into force. The former approach has the advantage that existing arrangements, which may be the result of careful advice, are not upset. The new trust of land will involve the trustees in having the legal estate, so that where a tenant for life at present has the legal estate, there would have to be a transfer of the legal estate to the trustees. However, leaving existing settlements alone has the disadvantage that, for a considerable time to come (and even given the rule against perpetuities some settlements can last a long time), there would not be a dual system but a triple system of settled land, trusts for sale and the new trust of land. An immediate change has the disadvantage that a tenant for life who has hitherto had total control over the land would lose it overnight. This is a very real problem. However, we think it might be adequately dealt with by provisions relating to delegation and consents as to which, see below. It might also be said that to change existing settlements is to defeat the settlor's intention. However, the trust of land is not a trust for sale, and while it is true that the tenant for life loses some of his powers, we would suggest that, as a

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67 Law of Property Act 1925, s.25(1) and see Re Rooke [1953] Ch. 716, Re Atkins' W.T. [1974] W.L.R. 761.

whole, the new trust of land would not be radically different from a settlement under the Settled Land Act. We would particularly welcome views on this point. Our provisional view is that while an immediate change to the new system might cause initial difficulties, the advantages in terms of simplification of the system are overwhelming. If this proposal proves acceptable, we would envisage a provision so that, on the date the Act comes into force, the legal estate presently vested in the tenant for life would, by statute, be vested in the trustees, and it would be essential for a purchaser to take a conveyance from the trustees to obtain a good title. Transitional provisions would have to deal with transactions which were between contract and conveyance at that date. Provision would have to be made for settlements where, at present there are no trustees. Some of the difficulties which could arise might be lessened if the tenant for life were to be a trustee.[68] The adoption of this proposal might have implications for the Land Registry, as the trustees might consider they had a duty to register their title, in order to protect the trust property.[69]

6.19 While it seems to us that, where settled land is concerned, the balance of advantage does lie in changing all settlements to the new system, where express trusts for sale are concerned, the question raises slightly different issues. The effect of a change is that the trustees lose the duty to sell. It is difficult to distinguish between those trusts where the settlor intended the trustees to be under a duty to sell and those trusts where a trust for sale was used as the only available form. To convert trusts of the first kind into the new trust of land is to alter what the settlor intended. We would tentatively suggest that, despite this, all express trusts for sale should be converted. It will, in practice, be impossible to distinguish between the two kinds of trusts. The trustees will still have the power of sale, and the beneficiaries may, in some circumstances, be able to force a sale.

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68 See para. 7.6.

69 See para. 11.1.

6.20 Where a trust for sale has been imposed by statute, then it should be converted into a new trust of land so that the trustees lose the duty to sell. The benefits of the new trusts where co-owners are concerned have already been discussed[70] and it seems important that all co-owners should obtain these benefits.

Trustees

7.1 Successive interests. The present provisions as to who shall be the trustees of settled land are elaborate. They are not set out here, but are contained in s.30 of the Settled Land Act 1925. In addition, the provisions of s.36 of the Trustee Act 1925 apply, laying down who has the right to appoint new trustees.[71] It seems to us that under the new trusts of land, such elaboration should not be necessary. The trustees should be the persons appointed by the settlor to be the trustees, and if, in the case of a settlement created by will, no trustees have been appointed, as at present the personal representatives of the settlor will act as trustees until new trustees are appointed. It is unlikely that there will be no trustees of an inter vivos trust. To constitute the trust, either the settlor must declare himself a trustee, or the trust property must be vested in trustees. Section 36 of the Trustee Act 1925 should continue to apply where new trustees are to be appointed. Under s.30(1)(v) of the Settled Land Act 1925, those who together are entitled to the beneficial interests are able to appoint trustees if none (other than the personal representatives of the settlor) are available under the other parts of the section.[72] Beneficiaries of a trust for sale have no such express power. However, the Settled Land Act power is really a recognition of the fact

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70 See para. 6.4.

71 Trustee Act 1925, s.64.

72 Re Spearman [1906] 2 Ch. 502.

that if all the beneficiaries are ascertained and of full age, they could bring the settlement to an end.[73] Similarly, the beneficiaries could bring a trust for sale to an end, and while they have no power to appoint a new trustee, the knowledge that they can end the trust should influence those who do have the power of appointment.[74] It should be pointed out that it is probably unusual for all the beneficiaries of a trust to be ascertained, and of full age, except where the trust arises through co-ownership. It seems to us that it might be useful to add to s.36 of the Trustee Act 1925 so far as the trusts of land are concerned, a provision that, where all the beneficiaries are ascertained and of full age, they should, acting unanimously, be able to appoint a new trustee or trustees. Such a provision recognises the strong position of such beneficiaries. There seems no reason why this power should not apply to all trusts, and not just to trusts of land. However, this raises matters beyond the scope of this paper. We consider that the power should take priority over the right of remaining trustees to appoint bearing in mind that the beneficiaries could end the trust. Purchasers do not have to enquire as to whether the trustees have been properly appointed.[75]

7.2 Where land is held on trust because it has been conveyed or devised to a minor,[76] the above provisions would apply, so that either the grantor or the testator should appoint trustees. If a testator fails to do so, then his personal representatives will be trustees for the time being. If a grantor fails to do so, then the conveyance should be treated as a declaration of trust in favour of the minor.

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73 Saunders v. Vautier (1841) 4 Beav. 115.

74 Although it does not always do so, Re Brockbank [1948] Ch. 206.

75 Trustee Act 1925, s.38.

76 Settled Land Act 1925, s.27.

7.3 Where land is conveyed to co-owners, the provisions of s.34(2) of the Law of Property Act 1925 should continue to apply so that the land would be treated as if it had been conveyed to the four first named in the conveyance as joint tenants to hold it on trust for all those named in the conveyance. They would not, of course, be holding it on trust for sale, but on the new statutory trust. The provisions of s.36 of the Trustee Act with the amendment suggested above, should continue to apply where new trustees are to be appointed.

7.4 Where the trust arises on intestacy, the administrators would be the trustees as at present.

Powers of trustees

7.5 Powers. At present, the powers of a trustee for sale are decided by reference to the powers of a tenant for life. The powers of the tenant for life, as set out in the Settled Land Act 1925, are extremely complex without being comprehensive. The starting-point for the powers of the tenant for life was a situation where the tenant for life had virtually no powers to deal with the legal estate. During the 19th century, his powers were gradually increased, with powers to deal with particular situations being added bit by bit. The result is not appropriate to a modern trust. In particular, when applied to trusts for sale, they do not give the trustees power to raise the purchase price of the land by mortgage. The Law Reform Committee have recommended[77] certain alterations to the powers of the tenant for life. While we agree that these amendments would go a long way towards improving the present situation, we consider that a simpler solution might be found by a more radical reform of this area. It seems to us that trustees could be given all the powers over the land of an absolute owner. To do so is not to put the beneficiaries at the mercy of the trustees, because trustees always have to exercise their powers for the benefit of the trust. Any list of

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77 Law Reform Committee, 23rd Report, Cmnd. 8733, paras. 8.1-8.10 and see Appendix C.

powers is almost bound to have omissions or to become unsuitable with the passing of time. We understand that it is common practice to give trustees far greater powers than they are given by statute in any event. The question that then arises is whether a settlor should be able to limit the powers of the trustee. Is it essential that there should be someone with an unfettered power of sale? We doubt if the conditions which gave rise to this being a matter of such importance in the past still exist today, and we therefore very much doubt whether any such provision is necessary provided that the position of purchasers is protected. We will be grateful for any views on this point. It may be that the suggested extension of the powers of trustees should only apply to trusts imposed by statute, as, for example, where there is co-ownership, and not to express trusts.

7.6 Tenant for life as a trustee. Where there is a tenant for life,[78] one of the disadvantages of the proposed new trust is that the tenant for life would no longer have the powers of disposition and management that he has at present. That this is not an overwhelming disadvantage is demonstrated by the preference shown for the creation of trusts for sale rather than settled land. However, it may be a problem in some cases. Increased powers of delegation[79] may assist, but one other idea is to give the tenant for life a right to be appointed as a trustee. This would give him a direct voice in the management of the property, while the other trustees (there would have to be at least one other if the land were to be sold) would ensure that the interests of other beneficiaries were protected. The right to be appointed as trustee should not apply if the settlor excludes it, nor should it apply if there are already four trustees.

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78 While not at this stage attempting an exhaustive definition of who would be a tenant for life, we envisage including most of those at present given the powers of the tenant for life by the Settled Land Act 1925.

79 See para. 8.2.

7.7 Duty to act unanimously. The Law Reform Committee has considered[80] the question as to whether the rule that trustees must act unanimously except where the settlement contains power to act by a majority, is a satisfactory one. They concluded, and we agree with their conclusion, that the rule is satisfactory and should remain. It is apparently rare for power to act by a majority decision to be conferred in the settlement, and the Law Reform Committee thought it significant that this particular rule is usually retained. It should be noted that the effect of the rule will no longer be that one trustee can force a sale;[81] instead, subject to application to the court under s.30 of the Law of Property Act 1925, one trustee would be able to prevent a sale. Since there would be no duty to sell but only a power to sell, all the trustees would have to agree to a sale. Removing the emphasis on sale is arguably a major change but one which fits in with the general theme of this proposal.

Beneficiaries

8.1 Should the beneficiaries of the new trust have any special rights over and above those rights which the beneficiaries of any trust have?[82] We have already discussed the possibility that where there is a tenant for life, he should have a right to be a trustee.

8.2 Delegation. The present provisions relating to delegation by the trustees are rather limited. Under s.29 of the Law of Property Act 1925, the trustees may delegate to the life-tenant the powers of and incidental to leasing, accepting surrenders of leases and management. Delegation must be in writing and is revocable. The delegated powers are exercised in the name of the trustees, but the life-tenant is liable for

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80 Ibid., para. 3.60.

81 As for example, in Re Mayo [1943] Ch. 302.

82 As to which see Hanbury and Maudsley Modern Equity 12th ed., 1985, pp. 493-495.

any breach of trust, the trustees are not. If the trustees refuse to delegate, the life-tenant can apply to the court who may order the trustees to delegate.[83] We would suggest that where an existing settlement is converted into the new trust on the coming into force of these provisions, and the tenant for life has, at that date, the legal estate and the powers of a tenant for life under the Settled Land Act, there should be a statutory irrevocable delegation of the trustees' powers of management, including the power of sale, to the tenant for life. The trustees should not be liable for the life-tenant's exercise of these powers. They have no choice over delegating them.

8.3 Where a new settlement is created after these provisions come into force, or a new tenant for life becomes entitled, the discretionary power to delegate should continue to exist and should be extended so that the trustees can delegate all their powers, including the power of sale. However, the total exclusion of the trustees' duty seems unnecessarily wide, and there should be better provision to ensure that the interests of other beneficiaries are not damaged. Where trustees employ agents, the Law Reform Committee has recommended[84] that trustees should have a duty to exercise a general supervision over the agent. The wording suggested there is not appropriate here because the trustees' discretionary powers are being delegated, and not merely the carrying-out of specific acts. It is probably already true that, in deciding whether to delegate, trustees already are under a duty to take into account the interests of the remaindermen. This could be extended so that the trustees come under a duty to exercise a continuing general supervision over the trust property in order to safeguard the interests of the other beneficiaries. It has been a criticism of the settled land system that the remaindermen have had too little protection.[85] The proposed system of

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83 Law of Property Act 1925, s.30.

84 Ibid., para. 4.11.

85 England v. Public Trustee (1967) 112 S.J. 70.

delegation would give the tenant for life some control, while providing better protection for the remaindermen. The courts should continue to be able to order delegation in appropriate cases if the trustees refuse.

8.4 We would envisage that delegation would operate in the same way as delegation under s.25 of the Trustee Act 1925, except that the delegation need not be limited to twelve months. Delegation would thus be by power of attorney and as under s.25 the trustees would continue to be liable for the acts or defaults of the donee of the power. We would welcome views as to how capital monies received by the tenant for life when exercising his delegated power should be treated. It is clearly important that the interests of any remaindermen are adequately protected. In this connection we would welcome information as to how delegation under s.29 of the Law of Property Act 1925 and under s.25 of the Trustee Act 1925 works. At present it seems to us that the tenant for life could receive the money. The remaindermen would be protected by the continuing liability of the trustees.

8.5 Consent to sale. It is one of the paradoxes of the present system that it is impossible for a settlor to restrict the power of sale of a tenant for life of settled land,[86] but possible to make the sale of land held on trust for sale subject to consents. The policy of the Settled Land Act 1925 was to ensure that land was not made inalienable, but the provisions relating to trusts for sale do not seem to have caused any great difficulties. The court has a power to order a sale where a consent is refused.[87] We suggest that the power of sale under the trust should be capable of being made subject to the consent of one or more persons. There should be a provision equivalent to s.30 of the Law of Property Act

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86 Settled Land Act 1925, s.106.

87 Law of Property Act 1925, s.30.

1925 where consent is refused. A purchaser should, as at present, only have to ensure that the consents of not more than two people have been obtained, even if more are required by the trust deed.[88] If title to the land is registered any requirement for consents will be reflected in the restriction registered to protect the beneficial interests.

8.6 Consultation. As has been said, the present provision relating to consultation is weak.[89] Like the statutory power to postpone, it is arguable that this duty is an implicit recognition of the inappropriateness of the duty to sell in some of the situations where the 1925 legislation imposed one. Once there is no duty to sell, there seems less need for any special provision regarding consultation. The trustees have a general duty to exercise their powers for the benefit of the beneficiaries. That, coupled with an extension of the rights of beneficiaries to apply to the court,[90] might be sufficient protection. However the existence of the duty to consult may ensure that the beneficiaries are aware of some action by the trustees so that they can take steps to prevent it before it is too far advanced. In this respect the duty to consult is valuable, although, in its present from, probably too weak to be of use. If it is thought necessary to retain some similar provision, then a more definite right to be informed as to the trustees' future actions would be preferable.

8.7 Rights of residence. The tenant for life of settled land clearly has the right to occupy the land. That is, generally speaking, the purpose of the settlement. Under a trust for sale, the position may depend on whether the land is held on express trust for sale, when there may be no rights of residence,[91] or on the statutory trusts for sale

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88 Settled Land Act 1925, s.26.

89 See para. 3.12.

90 See para. 10.10 (iv).

91 Barclay v. Barclay [1970] 2 Q.B. 677.

imposed on co-owners, where there are.[92] The rights of residence of co-owners depend on the pre-1926 law, and have been the matter of some dispute. The difference between the two situations seems to arise because the trust for sale in the latter case is a mere conveyancing device, in other words, wholly artificial. Once again, the imposition of an unnecessary duty to sell has made the law more complex than it need be. We would suggest that all beneficiaries who have present (as opposed to future) interests in land should have a right to occupy the land unless specifically excluded by the settlor or unless the trustees have been given discretion to choose which beneficiary can occupy. This would mean that those entitled on intestacy might acquire rights of residence if the administrators retained the property after the "initial stage" referred to above.[93] While this is probably a change from the present position, there does not seem anything wrong with the result, because such a situation is likely to arise where there are infant beneficiaries or a widow with a life interest. The right of residence should not apply to, for example, rented property which the trustees hold for investment purposes.

8.8 There should be a clear statutory provision giving the courts power to direct how the rights should be exercised.[94] At present, the court varies occupation rights on an application by one co-owner for an order for sale under s.30.[95] We would suggest that in accordance with our other recommendations for broadening the scope for s.30, a beneficiary should be able to apply for the rights of occupation to be varied, even if he is not applying for a sale.

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92 Bull v. Bull [1955] 1 Q.B. 234.

93 See para. 6.13.

94 Such a jurisdiction would not be entirely novel, as the courts already vary rights of occupation under the Matrimonial Homes Act 1983 and the Domestic Violence and Matrimonial Proceedings Act 1976. The Matrimonial Homes Act 1983, s.1(11) clearly assumes that equitable co-owners do have rights of occupation.

95 Dennis v. McDonald [1982] Fam. 63.

8.9 The settlor should be able to exclude the right of residence if he so wishes. The right of residence would be capable of being overreached if the land were sold and the purchase price paid to at least two trustees or a trust corporation. Once a sale took place the beneficiaries would no longer have any interest in the land and would thus have no right of residence in it. It is important to make this point so that it is not thought that the right of residence we propose is a new separate right, capable of subsisting on its own. We are merely suggesting that the present law should be clarified to make it clear that one aspect of being the beneficiary of a trust of land may be having the right to occupy it, just as a beneficiary has the right to be consulted, or the right to receive the trust income.

8.10 Occupation rents. If each beneficiary has a right to occupy, should the courts have the power to order, for example, one co-owner to pay money to the other in respect of that occupation?[96] The present law is discussed at some length at first instance in Dennis v. McDonald,[97] where Purchas J. accepted that, "the true position under the old authorities was that the Court of Chancery and Chancery Division would always be ready to inquire into the position as between co-owners being tenants in common either at law or in equity to see whether a tenant in common in occupation of the premises was doing so to the exclusion of one or more of the other tenants in common for whatever purpose or by whatever means. If this was found to be the case, then if in order to do equity between the parties an occupation rent should be paid, this would be declared and the appropriate inquiry ordered. Only in cases where the tenants in common not in occupation were in a position to enjoy their right to occupy but chose not to do so voluntarily, and were not excluded by any relevant factor, would the tenant in common in occupation be entitled to do so free of liability to pay an occupation rent." However, it

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96 There is a statutory power to do so in respect of married couples, Matrimonial Homes Act 1983, s.1(3).

97 [1982] Fam. 63, at pp. 70-71.

appears that such a power to require payment of a rent only exists if the situation is one where the court would have power to order a sale.[98] The question that arises is whether this power should be placed on a statutory footing, or whether it is best to leave the court with the widest powers possible under a re-drafted s.30. The advantage of legislating is, as always, that it would bring greater certainty, and so make settlements out of court more likely. The disadvantage in this particular case is that to bring greater certainty, one would have to define, with some precision, the situations in which an occupation rent could be paid, and to do so would restrict what is at present a broad jurisdiction. In addition, one might have to lay down principles on which the rent is to be calculated, a matter on which there is relatively little law.[99] Should it be related to the market rent, or to the fair rent as if a tenancy of the dwelling were regulated under the Rent Act 1977 or to the "reasonable rent" as if it were a restricted contract? An alternative measure might be the income lost to the non-occupier through not being able to invest the money he would have received had the property been sold. The circumstances in which the rent might be ordered to be paid seem to be so varied that any attempt at precise definition is likely to lead to unjust results. Accordingly, we suggest that, at most, there should be a provision along the lines that the occupation rent should, so far as equitable and practicable, compensate a beneficiary for his loss of occupation rights.

8.11 Quite apart from the payment of an occupation rent it seems right that there should be provision, similar to that in s.1(3)(c) of the Matrimonial Homes Act 1983, to the effect that, where appropriate, a court can impose obligations regarding repair, maintenance, and discharge of liabilities in respect of the property. It is probably true that a court can already do this under s.30 of the Law of Property Act 1925, but clarification might be an advantage.

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98 See Bernard v. Josephs [1982] Ch. 391.

99 See Dennis v. McDonald [1982] Fam. 63, at p.80.

Position of Third Party

9.1 Purchasers[100] should find their position much improved by the new scheme. Where land is at present settled under the Settled Land Act 1925, they have to take a conveyance from the tenant for life, but pay the money to two trustees. As has been seen, they may be in difficulties if the settlement has, in fact, ended. Under the new scheme, as under a trust for sale now, a purchaser will take his legal title from the trustees and, providing the money is paid to at least two of them, or to a trust corporation, the interests of the beneficiaries will be overreached.[101] The beneficiaries will then have interests in the proceeds of sale and not in the land.

9.2 If the money is paid to only one trustee and that trustee is not a trust corporation, the position will be as at present, in that the interests of the beneficiaries will not be overreached. If the title to the land is not registered, a bona fide purchaser for value will take free of the interests if he has no notice.[102] If title is registered, he will as at present take free unless either the interest is protected on the register by entry of a restriction or caution, or a beneficiary is in actual occupation and so has an overriding interest.[103]

9.3 Another third party who may become involved is a judgment creditor. At present, a judgment creditor may obtain an interest in land by obtaining a charging order on the debtor's interest. The Charging Orders Act 1979 covers any interest in land held on trust, and no amendment would be necessary.

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100 By which we include lessees, mortgagees and any other person who acquires an interest in the land.

101 Law of Property Act 1925, s.2.

102 It should be noted that an interest behind a trust is not capable of registration under the Land Charges Act 1972.

103 Land Registration Act 1925 s.70(1)(g).

9.4 Under s.17 of the Settled Land Act 1925, where the estate owner (that is, the person with the legal estate) holds the land free from other equitable interests under a trust instrument, the trustees are bound to execute a deed declaring they are discharged. A purchaser can then assume the land is no longer settled land. There is no comparable provision for trusts for sale. The provisions of s.17 cannot be adopted in their entirety for the new trust because they assume that the legal estate is held by someone who is beneficially entitled. Trustees for sale already have a duty, if requested by a beneficiary entitled to have the legal estate vested in him, to transfer the legal estate to the beneficiary. Where the proceeds of sale are held in trust for persons of full age in undivided shares absolutely, those persons can require the trustees to vest the land in them as joint tenants on trust for sale.[104] What is required is that the trustees should be given a power so to convey and a duty to execute a deed of discharge which would protect a purchaser.

9.5 If the proposal in para. 6.18 were adopted, viz. that all settled land should be converted into land held on the new trust, the position of mortgagees of that land would require consideration, as would the position of the tenant for life where he has mortgaged the trust land. There is no reason why the remedies of the mortgagees which are exercisable against the land, for example, taking possession or appointing a receiver, should not continue to be exercisable. The only difference would be that as the legal estate would be vested in the trustees, it would be necessary to bring proceedings against them. But what of the personal liability of the tenant for life? Unless there are express powers in the settlement the tenant for life can only mortgage the legal estate for certain purposes connected with the settlement.[105] It is therefore arguable that his personal liability should cease once he loses the legal estate. However, this might prove unacceptable to mortgagees and we do seek views as to what transitional provisions might be made to cope with this problem.

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104 Law of Property Act 1925, s.3(1)(b)(ii).

105 Settled Land Act 1925, s.71.

Powers of the Court

10.1 At present, matters affecting a trust of land may come before the court under s.64 of the Settled Land Act 1925, s.57 of the Trustee Act 1925, s.30 Law of Property Act 1925 or in the exercise of its inherent jurisdiction.[106] In addition, of course, the court has jurisdiction to deal with breaches of trust. We are not intending to make any recommendations relating to the inherent jurisdiction of the courts or their powers over trustees who are in breach of their duty. These matters are the same for all trusts and have no special significance for trusts of land. However, the other sections will require some amendment if they are to fit in with the proposed scheme.

10.2 Section 64 of the Settled Land Act and s.57 of the Trustee Act are similar sections which give the court power to permit, in the case of s.64, a tenant for life, and in the case of s.57, the trustees, to do something which would otherwise be outside their powers. Section 57 has no application to settled land. We would suggest that if this proposed scheme is implemented so that the legal estate is held by the trustees, the provisions of s.64 would be unnecessary because s.57 would provide the court with adequate powers to assist in all cases.[107]

10.3 The limitations of s.30 of the Law of Property Act 1925 have already been referred to, but it is useful here to draw together the issues relating to this section in order to produce a coherent proposal. There are two issues involved in any examination of s.30. First, under what circumstances and by whom can an application be made, and secondly, what powers should the court have and under what conditions should they be exercised?

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106 As, for example, in Re Duke of Norfolk's Settlement Trusts [1982] Ch. 61.

107 The Variation of Trusts Act 1958 applies if a permanent additional power is required.

10.4 It might be suggested that it is unnecessary to confer special powers on the court where trusts of land are concerned. Where other trusts are concerned, the courts can and will act to restrain a breach of trust, but the courts do not normally interfere with the exercise of discretion by the trustees unless their discretion is so exercised that the exercise of the discretion is itself a breach of the trust. Why is a special power needed? It is probably true that where express trusts are concerned, the trustees are managing investments for the benefit of a number of beneficiaries, and disagreement among the trustees to the point where they can no longer operate the trust is unlikely. Even if such disagreement were to exist, the solution would probably be for some of the trustees to retire and, in the meantime, the effect of the disagreement would be unlikely materially to affect the interests of the beneficiaries. However, where trusts of land arising out of co-ownership are concerned, the trustees and the beneficiaries are likely to be one and the same. The case law shows that all too often disputes can arise as to the occupation of the trust property, and failure to agree may lead to one or more of the trustees or beneficiaries being homeless. Therefore, in this area, the courts have found it necessary to interfere with the exercise of the trustees' discretion.

10.5 The present provision enables any person interested to apply to the court to force a sale or to make trustees exercise a power. It does not enable anyone to apply to prevent a sale or to prevent the exercise of a power. Where the trustees are acting in breach of trust, a beneficiary can apply to the court anyway and special statutory provision is unnecessary. However, the effect of s.30 is to allow the court to act where there is no breach of trust and to substitute its own discretion for that of the trustees. In the context of co-ownership, the present restriction on the circumstances in which an application may be made may not matter, as the trustee who wants to sell will be unable to do so without his co-trustees' concurrence and so will apply to the court. However, it is strange that the co-trustee cannot initiate the proceedings. We would provisionally recommend that s.30 be amended so that any person interested can apply to the court to prevent or to force the trustees to exercise their powers.

10.6 "Any person interested" may not include trustees who are not beneficiaries. Trustees under this proposal would have to act unanimously in order to sell as they have a power to sell, not a duty. The Law Reform Committee has already recommended[108] that trustees should be able to apply to the court for a sale, and the court could then override the wishes of the dissenting trustees. We agree with this recommendation, but are able to go further than the Law Reform Committee who were considering reform of the trust for sale only, and we suggest that a a trustee, like a beneficiary, should be able to apply either to force or to prevent a sale.

10.7 At present, the court has power to make "such order as it thinks fit". It appears that this only gives the court discretion as to whether to order a sale and as to the terms of that order if it does order a sale.[109] It can also order the trustees to exercise their power of delegation or dispense with the consent to sale of a beneficiary. It cannot refuse to order a sale and still order an occupation rent to be paid.

10.8. Once the duty to sell has been removed, there is no longer any reason for the preference for sale which is implicit in the terms of s.30. We therefore would suggest that any trustee and any person interested should be able to apply to the court to prevent or to force a sale, to make the trustees delegate their powers, to dispense with the consent to sale of any beneficiary, and to vary the rights of occupation of the beneficiaries. Coupled with this last power should be a power to order the occupying beneficiary to pay an occupation rent to the other beneficiary. We have already discussed the difficulties which might arise if a more detailed provision were made. The court should also have power to make a suspended order.

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108 Law Reform Committee, 23rd Report, Cmnd. 8733, para. 3.63.

109 Bernard v. Josephs [1982] Ch. 391, 410, per Kerr L.J.

10.9 There is one further aspect of s.30 which should be considered. At present, there are no statutory guidelines as to how the court should exercise its discretion. The guidance to be derived from the cases is based on the assumption that there is a duty to sell. If the court's powers are made wider, then it may seem advisable to give some guidance as to how the discretion should be exercised. Such guidance would assist in encouraging settlements out of court. Without it, litigation will have to take place before it is known how the courts will exercise their wider powers. What guidelines might be appropriate? Where the property in question is a dwelling and held on trust for co-owners, and has been occupied by them as a family home, it would seem desirable to state explicitly that the welfare of any children should be taken into account in deciding how to exercise their powers. Arguably, in line with other legislation, the welfare of the children should be the first consideration.[110] The existing position is unsatisfactory, because while it is usual to take their interest into account, some judges have done so directly, while others say that the interests of the children can only affect the outcome in so far as they affect the equity of one of the co-owners.[111] It will be necessary to find a suitable definition of "relevant children", because this provision should apply to unmarried as well as to married couples. Possibly a relevant child should be any child who occupies the dwelling in question and is a child (or has been treated as a child) of any person entitled to occupy by virtue of the trust. A common judicial approach in deciding whether to order a sale has been to examine the purpose for which the dwelling was bought and to order a sale if the purpose no longer exists. This too should be put on a statutory footing. It should not be forgotten that the courts may be asked to exercise their powers where there are successive rights. While this is so at present, the case law refers mostly to disputes between co-owners. Where there are

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110 See e.g. Matrimonial and Family Proceedings Act, 1984, s.3.

111 See Rawlings v. Rawlings [1974] P. 398, Burke v. Burke [1974] 1 W.L.R. 1063, Williams v. Williams [1976] Ch. 278.

successive interests, it is arguable that if the tenant for life wants a sale, he should be allowed to have it unless there are exceptional circumstances. At present, if successive interests are created under the Settled Land Act, the tenant for life can choose when to sell. Under the proposed scheme, he will not be able to do so unless the power has been delegated to him, although he may have considerable influence as one of the trustees.[112] Should the court have to give first preference to the wishes of the tenant for life? We would suggest that the tenant for life should generally be able to prevent or to force a sale, but that the court should have regard to all the circumstances of the case. Where there are concurrent interests, it seems sensible that, although the court should have regard to the circumstances referred to above, in the absence of special considerations, the wishes of the majority in value should prevail.

10.10 To sum up, we are suggesting that the court should have regard to the following matters:-[113]

(i) the purpose for which the property was purchased, so that if that purpose no longer exists, the property should normally be sold;

(ii) where the property is occupied by co-owners as a family home, the welfare of any children who occupy and who are the children of any person entitled to occupy under the trust;

(iii) the wishes of the tenant for life;

(iv) the wishes of the majority in value of those holding interests in possession in the property.

Having considered all these factors, the court should still be able to take into account other relevant considerations.

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112 See para. 7.6.

113 The Insolvency Bill 1985 makes specific provision where an application is made under s.30 as the result of insolvency and we would therefore suggest that cases covered by this provision should be expressly excluded from the proposals made here.

10.11 It might be thought odd to have such specific matters in a successor to s.30, yet to have suggested the removal of the right of the beneficiaries to be consulted. However, as has been said, the existing right to be consulted is too weak to be of any great use. To impose a set of restrictions similar to the above on trustees seems unnecessary. They are liable to the beneficiaries if they act in breach of trust. Knowledge of the factors the court may look at will influence their actions. In view of this, it seems better to impose the guidelines on the court, where they may assist in the settlement of litigation, rather than on the trustees, where they should be less necessary.

Land Registration Implications

11.1 The proposed scheme should greatly simplify the position as regards registered title. Where land is settled under the Settled Land Act 1925, either the tenant for life, or the statutory owners, are registered as proprietors with different restrictions being entered depending on whether there are trustees.[114] Land held on trust for sale is always registered in the names of the trustees with a restriction being entered unless the registrar is satisfied that the trustees are beneficially entitled.[115] We would propose that all land held on the new trust should be treated as land held on trust for sale now.

11.2 We have already recommended that the old and new systems should not run in parallel so that settled land and land held on trust for sale should be converted into the new trust of land. This would make no difference to the registered title of land held on trust for sale, but where at present the tenant for life is the registered proprietor, it is necessary for the trustees to become the registered proprietors. It is obviously impracticable for this to be done on the initiative of the Land Registry,

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114 See Ruoff and Roper, Registered Conveyancing, 4th ed., 1979, Ch. 19.

115 Land Registration Act 1925, s.58(3).

who would not know the names of the trustees and for whom it would be a huge administrative task. It is also unrealistic to expect every tenant for life to execute a transfer to the trustees. It would be possible to ask trustees to register themselves as proprietors. However in cases where the title to settled land is registered there is a duty to enter a restriction, and the restriction will always name the trustees unless there are none.[116] Where the trustees are named, it would be possible to deem them to be the registered proprietors with automatic vesting and divesting of the legal estate and powers of disposition.[117] In other cases, the best solution seems to be to make the change when there is a registered disposition or charge of the land. It could be provided that, as in unregistered land, only the trustees can give the purchaser a good title, and where the tenant for life is a registered proprietor (and the restriction will show that he is only a tenant for life), a special form could be used whereby, in one transaction, he would transfer his title to the trustees and the trustees would transfer it to the purchaser.[118] Similarly, if the land was to be charged, the procedure would make it clear that the trustees had the power to do so, and the opportunity would be taken to make them the registered proprietors. The tenant for life would be placed under a duty to execute the necessary documents. Where the powers had been delegated to a beneficiary, we would suggest that the trustees should remain the registered proprietors, but should have a duty to execute any documents which are necessary for the beneficiary to exercise his delegated powers.[119]

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116 Land Registration Act 1925, s.86 and Land Registration Rules 1925, rr 56-59 and Forms 9-11.

117 Although this information may be out of date.

118 Possibly, this could be effected by a declaration by the trustees as to the circumstances of the transaction, and this would be sufficient for the purchaser to become registered as the proprietor, cp Administration of Estates Act 1925, s.36(6).

119 Although this would not be necessary it the trustees granted the tenant for life a power of attorney.

Conclusion

12.1 We hope that the preceding paragraphs have demonstrated that there would be advantages in creating a new trust of land which would fulfil both the functions of the Settled Land Act and the functions of the trust for sale. Such a single system would have the obvious advantage of greater simplicity than the present dual system. One disadvantage of the proposal is that it removes the automatic entitlement of a tenant for life (often the person who occupies the land and currently has the greatest interest in it) to have the legal estate vested in him alone and to exercise complete control over the land. The tenant for life, acting alone, is likely to be able to make quicker, though not necessarily better, decisions than the trustees who must agree a course of action. However, in practice the Settled Land Act is, we think, very little used. Indeed, one of the matters on which we particularly seek information is the extent of its current use. We are also aware that the administration of very large settled estates may involve different factors, and we would welcome information as to the extent to which the Settled Land Act 1925 is still used, for them and whether the introduction of this proposal or any aspect of it would cause particular problems for large estates. One other aspect of this proposal which might be seen as a disadvantage in principle is that it does involve some substantial re-writing of the 1925 property legislation. We need to be very sure that such a major change would be a change for the better. We therefore seek comments or criticisms on all aspects of this proposal.

PROPOSAL II

Conversion of All Settlements to Trusts for Sale

13.1 It has been suggested[120] that the best way to solve the problems caused by the dual system is to repeal the Settled Land Act 1925 so that all settlements are created behind a trust for sale. For the

120 See Cheshire and Burn's Modern Law of Real Property, 13th ed., 1982, p. 205.

purposes of the discussion we assume that the existing trust for sale is adopted virtually unaltered. We do not believe that in fact this measure would effect any great change in the way in which settlements are generally ordered. Many settlements which could now be created under the Settled Land Act are not, and the trust for sale form is used. However, it would no longer be possible to give the tenant for life the unfettered powers which he has at present although delegation would be possible. His position is discussed further below. Where a person creates an inadvertent settlement by granting rights of occupation for life to someone in his will, at present that person as tenant for life is entitled to the legal estate and has full power to deal with the land. The fact that in such a situation the testator may have failed to make an express appointment of trustees is unlikely to matter until the point at which the land is due to be sold. Under this proposal, it would be essential for trustees to be appointed, as they must hold the legal estate and manage the land. This should not be a problem as provision could be made so that executors of the will are the trustees if no others have been appointed. As such, they would continue to hold the legal estate they obtained in their capacity as executors. Thus, the new system should be simpler where such inadvertent settlements are created, because there will be no need for a conveyance of the legal estate to the tenant for life. Similar problems should not arise with inter vivos settlements, as either the settlor must declare himself to be a trustee or the land must be vested in trustees. This is not to say that inadvertent settlements cannot be created inter vivos - they can, and the problems caused by them are discussed below.[121]

Existing settlements

13.2 Existing settlements could be allowed to continue in their present form, or they could be converted into trusts for sale. The problem with allowing them to continue in their present form is that

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121 See para. 16.16.

settlements can last for a considerable time, and thus an area of law that had otherwise disappeared would linger on. To convert them into trusts for sale may, however, do violence to the intention of the settlor, i.e. he may have intended that the tenant for life should have the legal estate and all the powers of disposition and management. Further, the settlor may not have intended the land to be sold. Although under the Settled Land Act 1925 it is always possible for the land to be sold, that is rather different from the position under a trust for sale where the primary duty of the trustees is to sell. The legal estate would have to be transferred from the tenant for life to the trustees, and the tenant for life would lose his powers. These problems could be ameliorated by making the sale of the land subject to the consent of the tenant for life, and deeming the trustees to have made an irrevocable delegation of their powers under s.29 of the Law of Property Act 1925. With these measures, we do not think there would be any great objection to converting all settlements into trusts for sale, and it would be a great advantage to get rid of the dual system in one go.

The tenant for life

13.3 A change to a system which relies exclusively on trusts for sale would remove power from the hands of the tenant for life and place it with the trustees. The existing system of settled land was intended to enable the tenant for life, who might well occupy the land, to make the decisions about it. As the person most closely interested, he would have the necessary knowledge to manage the land well. It may be said that giving the legal estate to the trustees is distancing management decisions from the land itself. Three answers may be given to this point. In the first place, it may be that there are now few settlements of the kind where the tenant for life occupies an estate, and so the problem may not be a real one. Secondly, if it does exist, it may be alleviated by providing that a sale can only take place with the consent of the tenant for life and by strengthening the power to delegate. At present, the settlor can make the sale of land subject to a trust for sale dependent on the consent of one or more of the beneficiaries. It may be that where there is a tenant for life (of course, not all settled land involves a tenant for life), there should

be an automatic requirement that the sale is subject to the consent of the tenant for life. Thirdly, the position of the tenant for life as the principal beneficiary and sole trustee arguably involves an unacceptable conflict of interests, and is harmful rather than beneficial.[122]

13.4 As to delegation, we make below some general suggestions for altering the power to delegate. Here, the question is whether the position of a tenant for life could be strengthened by an extension of the power to delegate. It would be possible to make provision for wider delegation than that provided by s.29 of the Law of Property Act 1925. All powers of trustees could be capable of being delegated, both before and after land is sold. At present, powers relating to the trust fund can only be delegated for the very limited period provided by s.25 of the Trustee Act 1925. We would see no objection to such an extension, provided that it were accompanied by the measures suggested below to ensure that the remaindermen are protected. Could the duty to sell be delegated as well? It would be possible to frame a provision to this effect, but we think it would be undesirable in principle. It is one of the fundamental principles of trust law that a trustee cannot delegate his duties. The requirement that a tenant for life should have to consent to a sale should be sufficient to give him some influence in the decision. The trustees will necessarily have to be involved in a sale, since they have the legal estate. The beneficiaries do, in any event, have the power to apply to court to force a sale.[123]

Purchasers

13.5 From the point of view of purchasers, the system has the advantage that they obtain a conveyance from the trustees and pay the purchase-money to those trustees. Purchasers no longer have to see a

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122 See para. 3.16

123 Law of Property Act 1925, s.30.

special vesting deed. The change would remove the danger which exists at present that the purchaser may take a conveyance from a person who is no longer entitled.[124] It also removes the doubts that do exist about the extent of the protection which a purchaser receives under s.110(2) of the Settled Land Act 1925.

Trustees

13.6 For trustees, the change would mean an increase in their duties. They would have to take primary responsibility for managing the estate. This would cause no problems for new trusts for sale, but where existing settlements are concerned, it might be that existing trustees would be unwilling or even unsuitable to be involved in this more onerous task, or, more likely, that the charging clauses in the original settlement would prove inadequate. The first problem can be solved by employing agents as permitted by s. 23 of the Trustee Act 1925 or by permitting the trustees to retire. The second can be solved by giving the court statutory power to increase the charges. Arguably, the court already has this power,[125] but in this instance a clear statutory power would seem desirable.

Powers of the court

13.7 In Proposal I we considered widening the powers given to the court by s.30 of the Law of Property Act 1925. Some of the suggestions made there would not be appropriate here, because if the land is held on trust for sale it seems right in principle that the court should lean in favour of a sale in the event of dispute. Therefore there is not such a strong case for providing guidelines for the exercise of the court's discretion. However, the other suggestions made there as to the widening of the range of those who can apply, enabling trustees or beneficiaries to

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124 Stone, "A Settled Land Act problem revisited", [1984] Conv. 354.

125 Re Duke of Norfolk's Settlement Trusts [1982] Ch. 61.

apply to stop a sale as well as to enforce one, and clarifying the law relating to occupation rents would all, we think, be changes which should be looked at in the context of this proposal.

Co-owners

13.8 Under this proposal co-owners would, as at present, hold the land on trust for sale for themselves as beneficiaries. It may be thought that this is undesirable and for that reason Proposal I or IV may be preferred. However, retaining the present system has the advantage that the system is reasonably well known, and with the changes suggested to s.30 it would work adequately. It might be desirable to clarify the situations where a trust arises, to include those where there are beneficial co-owners but only one legal owner.[126] It would arguably be improved if the suggestion discussed at para. 16.5 et seq. were adopted with the result that where there is no express declaration of the beneficial interests, the beneficial interests will be presumed to follow the legal interests with the result that the co-owners will be joint tenants in equity as well as joint tenants in law.

Registered title

13.9 The proposal would make settlements easier to operate where title to land is registered. It would work in the same way as the trust of land in Proposal I so that the trustees would always be the registered proprietors. Similar provisions would have to be made for the transfer of the legal title from the tenant for life to the trustees.

Conclusion

13.10 The advantage of this proposal is that it simplifies the law by repealing parts of the Settled Land Act 1925, while at the same time making use of a well-known and understood structure, the trust for sale.

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126 See para. 6.5.

By making use of an existing structure, there are less likely to be any unforeseen problems. The disadvantage is that the structure may not represent what the settlor wanted, since a sale might not have been in his mind at all and he may have wished the tenant for life to have the legal estate. While at present a settlor cannot prevent a tenant for life from selling, it might be difficult to explain to a would-be settlor that the trustees would have a duty to sell although coupled with the power to retain and subject to any consents that are required even though, of course, there is a power to postpone. The existence of the power to postpone might be said to make the trust for sale almost misleading to a layman. The proposal does little to alter the present system of co-ownership, although it could be combined with Proposal IV. Unless that proposal is adopted, one would be left with the rather unreal situation that where two or more people buy a house for their own occupation, they come under an immediate binding duty to sell it, even though there is a power to postpone which they actually intend to exercise.

PROPOSAL III

Changing the Burden of Proof

14.1 The problem of "inadvertent settlements", that is, settlements where the settlor unintentionally subjects his land to the regime created by the Settled Land Act 1925 and so confers on the person with a life interest extensive powers of disposition and almost total control of the land, could be solved by reversing the emphasis of the present legislation. At present, if land is conveyed in such a way as to create successive interests,[127] the Settled Land Act 1925 automatically applies unless an immediate binding trust for sale has been expressly imposed on the trustees. It would be comparatively simple to provide that wherever land

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127 Or to create any of the other interests set out in s.1 of the Settled Land Act 1925.

was conveyed in such a way as to create successive interests, a trust for sale would be presumed unless specifically excluded. If the land had not been conveyed to trustees, this would involve the appointment of trustees (but this may occur where settled land is created now) and the transfer of the legal estate to them. In other respects, this proposal would leave the existing law as it is. It has the advantage of disturbing the status quo very little, while going some way to solve some the problems created by the dual system. It could be combined with the fourth and fifth Proposals, IV and V.

PROPOSAL IV

A New System of Co-ownership

15.1 The automatic introduction of a trust, especially a trust for sale, into a simple purchase of land for occupation by two people is something that puzzles the layman. It is not entirely acceptable to the lawyer either, because although trustee-beneficiaries are by no means uncommon, it is of the essence of a trust that one person is managing the property for the benefit of another. If the interests of trustees and beneficiaries are entirely identical, then perhaps there should be no need for a trust. As has been said earlier, it is unlikely that those who framed the 1925 legislation had in mind the present situation where two people buy property in joint names for their own occupation. The proposal considered here is that we should develop a new form of co-ownership which would not involve a trust. This form of co-ownership would only apply where at present the legal and equitable interests are identical, that is, the land is owned by joint tenants holding on trust for themselves as joint tenants. Where this situation exists, the joint owners would simply be treated in the same way as a sole owner - that is, they would, together, have the whole legal and equitable interest with no trust interposed between the interests. They would be in the position of legal joint tenants before 1926 and in the same position as legal joint owners of chattels are now. This proposal would not apply where one legal owner holds on trust for himself and another, but only where the legal and equitable interests are identical.

15.2 The previous paragraph suggests that the trust could be dispensed with where the legal co-owners are beneficial joint tenants. What if they are beneficial tenants in common? The problem here is that the Law of Property Act 1925, s.34 prevents the creation of a legal tenancy in common. There is therefore necessarily a trust wherever there is a beneficial tenancy in common, because the legal and beneficial interests are not identical. To bring tenants in common within the proposal would involve reintroducing the legal tenancy in common. The problem with legal tenancies in common, and the reason why they were abolished, is that, each undivided share can be dealt with separately; thus many people can acquire interests in one piece of land and, as they are all legal owners, each one would have to execute the deed if the land is to be properly conveyed.[128] Land may become unsaleable if one person, perhaps with only one-hundredth of the estate, cannot be traced. We would welcome views as to whether the problems which were previously thought to be caused by legal tenancies in common would exist if such tenancies were revived. It seems to us at first sight that they would.

15.3 It might be suggested that this form of co-ownership should be restricted to the situation where the land is purchased for occupation by the joint owners. This would limit its application and prevent the use of this kind of co-ownership in property bought for investment purposes where possibly rather different issues arise. We seek views on this point, but at present we think that any such limitation would cause more problems than it would solve. The definition of "occupation" would be difficult. What of the home bought as a country cottage or the home bought for eventual retirement?

Disputes

15.4 It would be necessary to provide a procedure by which disputes relating to the management or sale of the land could be resolved.

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128 See example given by A. Underhill in Fourth Report of Acquisition and Valuation of Land Committee, Appendix I, p.30.

However, it is not entirely easy to see how such powers should be defined. When a court makes a decision in a dispute concerning a trust for sale, it can analyse the purpose of the trust, e.g. was it for sale, was it to provide a matrimonial home, etc., and make its decision in such a way as to fulfil the purpose of the trust. If there is no apparent purpose, then the court can fall back on the fact that it is a trust for sale, and the presumption that the property should be sold. If the joint owners are simply owners, there is nothing to analyse. It therefore seems necessary to provide some sort of principle on which the courts would decide such disputes. The Partition Acts gave preference to the majority, so that if the majority wanted a sale, the court would normally order one, but that is unlikely to assist here as generally there will only be two joint owners and, by definition, they will be equally entitled. Simply to say that the court may make such an order as it thinks fit is not enough, as it gives neither courts nor litigants any idea as to what an order is meant to achieve.

15.5 A comparison may be made with s.188 of the Law of Property Act 1925 which gives the court power to settle disputes relating to jointly owned chattels.[129] The joint ownership of chattels does not necessarily involve a trust. It states:

> Where any chattels belong to persons in undivided shares, the persons interested in a moiety or upwards may apply to the court for an order for division of the chattels or any of them, according to a valuation or otherwise, and the court may make such order and give any consequential directions as it thinks fit.

It should be noted that one must have at least a half share to apply and that the only order the court can make is one of division of the chattels.

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129 Law of Property Act 1925, s.28(3) provides for partition of land held on trust for sale, and the court can order partition, Law of Property Act 1925, s.30.

It seems to us that such limited powers would be inappropriate to land where the decisions made may affect the owners' housing position and where it is more likely that third parties will be involved.

15.6 It is suggested that any joint owner should be able to apply to the court, and that the court should be given wide powers to make whatever orders it thinks fit. We would also suggest that there should be statutory guidelines so that the courts should have to have regard to the following factors and then make such decision as seems just in all the circumstances. The factors which the court should have to take into account would be:-[130]

(i) the purpose for which the land was bought and whether that purpose still exists;

(ii) where the property is the family home, the welfare of any children of the joint owners;

(iii) where there are more than two owners, the wishes of the majority in number.

Sale

15.7 On sale, the joint owners would convey the entire legal and beneficial interest to the purchaser. It would be essential that all the co-owners joined in the sale, because there could be no equivalent to s.27 of the Law of Property Act 1925 which effectively allows two out of four (or more) co-owners to sell. No question of overreaching could arise, as there would be no separation of the legal and equitable interests. The purchaser would receive the whole interest in the property, both legal and equitable, from the co-owners. This raises the question of what happens to the purchase-money. Clearly, the money must be paid to (or at the direction of) all the joint owners, but how is it then to be held? It would be possible for the money to be held in the same way as the land is. This

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130 See, for further discussion of these issues, paras. 10.9 and 10.10.

would require no alteration in the present law, as there is nothing to prevent personal property being jointly owned without the existence of a trust existence. In the event of dispute, any joint owner could simply withdraw his share of the money.

Severance

15.8 As was said earlier, this proposal would probably only apply where the joint tenants hold the whole interest in the land. The right of survivorship would therefore apply. It is necessary to provide some system whereby the right of survivorship can be excluded. This would involve two things, first a separation of the legal and equitable interests, and secondly, severing the equitable joint tenancy. We would suggest that a provision should be made so that these two events could take place at the same time. Severance could take place in the usual way, by serving a written notice, by an agreement or by dealing with one's share in a way inconsistent with a joint tenancy. It would probably be necessary to provide that severance would be automatic where one co-owner becomes bankrupt, so that the bankrupt's equitable interest can pass to the trustee in bankruptcy.

Conclusion

15.9 The advantage of this proposal is that it seems to simplify the system that applies in the very common situation where two people purchase a house or other land, normally for their occupation. They would no longer be trustees. In practical terms, we wonder whether such a provision would make much difference to the situation of the joint owners. Provision still has to be made for the resolution of disputes and for the protection of the purchaser on the sale of the property. A major advantage might be that it would no longer be necessary to explain to the layman why he has to be a trustee for sale when all he wanted to be was an owner-occupier. One disadvantage is that to introduce a new system of co-ownership is to add something complicated to our already complex system of land law without taking anything away, and this might increase costs. It would still be necessary to keep the trust for sale for situations

where the trustees and the beneficiaries are not the same people or their estates or interests differ. It would not be necessary, of course, to keep settled land, because either Proposal I or Proposal II could be adopted and the Settled Land Act repealed, at least in part.

PROPOSAL V

16.1 This proposal, unlike the previous ones, does not involve any alteration in the structure of trusts of land. Instead, a series of small changes are described which would correct some of the difficulties which prevent the present dual systems from working properly. The proposals are not necessarily connected and any one or more of them could be combined with the previous proposals.

Law Reform Committee proposals

16.2 The Law Reform Committee has made numerous proposals connected with the powers of trustees. Some of these are relevant to trusts of land. We reproduce at Appendix C a summary of those proposals which are particularly relevant to trusts of land, and we would support these proposals.

16.3 In some respects, we think that the Law Reform Committee's proposals do not go far enough. Where their recommendation no.37 is concerned, that there should be a section corresponding to s. 36(7) of the Administration of Estates Act 1925 to protect the purchaser of land which has previously been subject to a trust for sale, we would suggest that any such provision should clarify those situations in which the trustees have power to convey the land in such a way as to end the trust for sale. We consider that their recommendation no.55 that trustees of a settlement should be empowered to require a tenant for life to obtain valuations of the settled land before it is sold, does not go far enough to protect the remaindermen, because it is still not clear when it would be a breach of trust for the trustees not to serve the notice which they suggest. Thus, the remaindermen might still be left without a remedy. We would suggest

the addition of a requirement that the trustees on receipt of a notice from the tenant for life that he is about to make some disposition of the land,[131] should be under a duty to send copies of it to such of the remaindermen as are ascertained and are of full age and to the parents or guardians of those under age. This would give the remaindermen a chance to make representations to the trustees, and would also give them the opportunity of offering to purchase the land if they so desire.

Doctrine of conversion

16.4 We have discussed earlier the artificiality of the doctrine of conversion and the confusion that now exists as to its application, so that interests under a trust for sale are sometimes interests in land and sometimes not. It seems to us that little purpose is served today by the doctrine of conversion, and that nothing would be lost by its abolition. We would therefore suggest that the doctrine be abolished, so that all interests in land held on a trust for sale are interests in the land, whether the land is held on an express trust or a statutory trust. While this reform on its own would not entirely alleviate the problem of using the trust for sale for co-ownership, where no sale is intended, it would remove some of the difficulties and it would be in line with recent judicial pronouncements on the subject.

Declaration of the equitable interests

16.5 A conveyance of the legal estate to two or more people as joint tenants does not operate as a declaration that they are joint tenants in equity as well. The beneficial interests have to be determined either by an express declaration of trust or by looking at extrinsic evidence of the intentions of the parties and their contributions to the purchase.

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131 The tenant for life is obliged to serve such a notice, Settled Land Act 1925, s. 101.

Unfortunately, it is by no means a general practice for there to be an express declaration and even if there is, the courts do not invariably give effect to it.[132] If there is an express declaration the first question that arises is whether, if the declaration is contained in the conveyance or transfer of the dwelling, the purchasers must have executed the conveyance or transfer for it to be an effective declaration. It has been held at first instance that they must,[133] and in the Court of Appeal that they need not.[134] The earlier case was not cited to the Court of Appeal, where Buckley L.J. said, "I think we must proceed upon the footing first that this was a declaration of trust inserted into the document at the behest of the purchaser or their solicitors; and that the legal estate was vested in the purchasers upon the trust declared in the document." Their Lordships did not refer to s.53(1)(b) of the Law of Property Act 1925 which says that a declaration of trust of land must be manifested and proved by writing, signed by some person who is able to declare the trust. However, it is arguable that s.53(1)(b) has no application where there is a conveyance of land to, for example, X and Y as beneficial joint tenants. X and Y do not thereby declare themselves to be trustees; the trust is imposed by statute. If the law is unclear, it is necessary for us to examine what the policy should be in order to determine what changes might be necessary. The advantages of requiring the purchasers to execute the conveyance (strictly speaking only a signature is required at present) is that there is a chance that they will read it, and question the nature of the interests being conveyed to them. If there is no such requirement, they may never see the conveyance and be quite unaware of its wording. Execution is desirable now, in order to extend the powers of the purchasers, but this would no longer be necessary if our proposal[135] to

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132 See para. 16.7.

133 Robinson v. Robinson (1976) 241 E.G. 153.

134 Pink v. Lawrence (1977) 36 P.& C.R.98.

135 Para. 7.5.

extend the powers of trustees of land were adopted. The disadvantages of requiring such execution are that if, accidentally, it fails to take place, one or other co-owner may be put at a disadvantage and it may cause delay to the transaction. Requiring formalities always puts a premium on advice and leaves the courts with the often difficult task of deciding what the effect of failing to observe the formalities should be. In general, it seems best to avoid the imposition of additional formalities unless they are absolutely necessary, and we would therefore suggest that no execution should be required.[136] It should be noted that purchasers are not, in any event, concerned with trusts affecting the proceeds of sale.[137]

16.6 Where title to the land is registered the purchasers may at present be required to execute the transfer, not in order to declare the nature and extent of the equitable interests, but in order to satisfy the registrar that they are the beneficial owners. This is because s.58(3) of the Land Registration Act 1925 provides that unless the registrar is so satisfied, he must register a restriction against the title. The standard form of transfer to joint tenants[138] provides for execution by the purchasers. However, the authority given[139] for this requirement is Robinson v. Robinson,[140] which, as has been said, is not the only authority, and is, in any event, concerned with the rights of the co-owners as between themselves, whereas the issue where registered title is concerned is the effect on purchasers. We would suggest that, as between the parties, the arguments in the previous paragraph apply and

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136 A useful comparison is s.65 of the Law of Property Act 1925 which states that a reservation of a legal estate operates without any execution by the grantee.

137 Law of Property Act 1925, s.27(1).

138 Form 19 (J.P.) c.p. Land Registration Rules 1925, Sched.

139 Ruoff and Roper, p. 321.

140 (1976) 241 E.G. 153.

execution should not be a requirement. We would further suggest that it is unnecessary as regards the registration of restrictions. A statement in the transfer that it is a transfer to beneficial joint tenants should be sufficient for the registrar not to have to enter a restriction, unless he has some other evidence that they are not the beneficial owners. Unless a restriction is registered, a purchaser is entitled to assume that the registered proprietors have full powers of disposition.[141]

16.7 The general view is that, if there is an express declaration, then in the absence of fraud or mistake it will prevail.[142] However, there have been suggestions that the courts should consider the purpose of the joint declaration, so that if it was designed to protect the co-owners' position on the death of one of them, it should not necessarily involve them receiving equal shares of the proceeds if the property were sold during their lifetime.[143] This seems to introduce unnecessary uncertainty. Where there is an express declaration of trust, it should always prevail unless there is fraud or mistake. An express declaration that the property is held with the co-owners as joint tenants in equity should therefore carry these implications: first, that either can sever at any time, and secondly that if severed, or if the property is sold and the proceeds divided, they receive equal shares.

16.8 Despite repeated reminders by the courts[144] many advisers fail to ensure that their clients make a declaration of trust. In such a case, the position is no more certain than it would be had the property been conveyed into one name only. The fact of joint legal ownership will

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141 Land Registration Act 1925, s.74.

142 Re John's Assignment Trusts [1970] 1 W.L.R. 955, Leake v. Bruzzi [1974] 1 W.L.R. 1528.

143 Burgess v. Rawnsley [1975] Ch. 429 per Lord Denning M.R. and see Wilson v. Wilson [1963] 1 W.L.R. 601.

144 Cowcher v. Cowcher [1972] 1 W.L.R. 425, Bernard v. Josephs [1982] Ch. 391, Walker v. Hall (1983) 14 Fam. Law 21.

not necessarily imply joint equitable ownership.[145] One is therefore thrown back to the necessity of examining the parties' conduct at the time of the purchase, and their respective contributions. From their conduct, one may be able to infer an agreement or a "common intention" as to how the property should be held. Their contributions may give rise to an equitable interest under a trust. It is often extremely difficult to decide what interests each should receive.[146] As Griffiths L.J. put it.[147] "The contributions must be viewed broadly by the judge to guide him to the parties' unexpressed and probably unconsidered intentions as to the beneficial ownership of the house. There is of course an air of unreality about the whole exercise ...".

16.9 Where difficulties arise from a failure to make clear provision as to what is to happen, it may be helpful for statute to fill the gap to declare what the beneficial interests are to be if no express declaration has been made. This can only be done if it is possible to make an assumption about what most of those who fail to make an express declaration would have said if they had made such a declaration. We would suggest that the fact that the house has been put into joint names should itself be indicative of an intention to create some form of beneficial co-ownership. Here, there is some evidence in respect of married couples,[148] none in respect of unmarried couples. Such evidence as there is suggests that a joint tenancy in equity is the wish of most married couples where they buy a house for their occupation. The right of survivorship whereby the surviving spouse automatically acquires the deceased spouse's interest in the house is the most frequently mentioned

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145 Pettitt v. Pettitt [1970] A.C. 777, 813.

146 See for example Young v. Young (1983) 14 Fam. Law 271.

147 Bernard v. Josephs [1982] Ch. 391, 404.

148 Todd and Jones, Matrimonial Property, 1972, Manners and Rauta, Family Property in Scotland.

reason for choosing joint tenancy.[149] We would consider it undesirable as a matter of principle for property law to differ for co-owners, depending on whether they were married or not. We therefore wish to seek views as to the desirability of a provision which would apply wherever a dwelling was conveyed into joint names at law without an express declaration as to the beneficial interests.[150] We assume this should only apply to dwellings, as business premises are less likely to cause problems. The provision would state that where there was no express declaration, the property would be deemed to be held for the co-owners as beneficial joint tenants.

16.10 Various further questions arise. Should the provision only apply where the dwelling is bought for the joint occupation of the co-owners? A dwelling might be bought as an investment. Should the deemed joint tenancy give way only to:-

(i) an express declaration, or

(ii) any agreement, or

(iii) a contrary intention of either party?

Of these (i) seems too absolute, while (iii) might allow the courts to infer a contrary intention from unequal contributions, which would reintroduce all the existing difficulties. It seems that (ii) may be the best way, again trying not to lay traps for the unwary layman by demanding formalities for such an agreement. There would therefore be certainty with flexibility for those who do not wish to be bound by the rule.

Severance

16.11 At present, under s.36 of the Law of Property Act 1925, an equitable joint tenancy can be severed either by notice in writing served on the other joint tenant, or by any method which would have severed an

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149 Although, for some couples, the tax or intestacy consequences of automatic survivorship may be undesirable.

150 Compare the provisions of the Partnership Act 1890 concerning ownership of partnership property.

equitable joint tenancy of personal property before 1926. This reference to pre-1926 law is now unnecessarily mystifying, and at the very least it would be desirable to have a statutory provision setting out all the methods which can be used. The most frequently adopted statement of the pre-1926 law is that of Page Wood V.-C. in Williams v. Hensman.[151] "A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share ... Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of mutual dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested." It has been accepted that the second and third categories are separate so that severance can be effected by a course of dealings which does not amount to an agreement to sever.[152] These three categories, together with the power to sever by written notice, could be incorporated into a statute.

16.12 Another possible reform which has a certain attraction is to make a written notice the only possible method of severance. The other methods do raise problems, for example, as to what is a sufficient act. It appears that issuing a writ for the sale of land is a sufficient act, but asking for a property settlement in a divorce petition is not.[153] Are the other methods necessary? Severance has to be looked at from two points of view: its effect on the other joint tenant and its effect on potential purchasers of the property. So far as a potential purchaser is concerned, he is not affected so long as there are two trustees holding the legal estate for, by paying the price to them, the equitable interests are

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151 (1861) 1 John & Hem. 546, 557.

152 Burgess v. Rawnsley [1975] Ch. 429.

153 Re Draper's Conveyance [1969] 1 Ch. 486; Harris v. Goddard [1983] 1 W.L.R. 1203. Whether the latter case shows the present law in a favourable light is questionable.

overreached. If there is only one legal joint tenant remaining and the land was originally conveyed to joint tenants on trust for themselves as joint tenants, the purchaser is entitled to assume that the right of survivorship has operated to vest the entire legal and beneficial ownership in the remaining legal owner, unless where title to land is unregistered a memorandum of severance has been attached to the conveyance to the joint tenants.[154] Where title to land is registered, the purchaser can assume the surviving proprietor can transfer a good title unless a restriction has been entered. Where land is transferred to joint owners, no restriction will be entered if the registrar is satisfied that they are jointly entitled in equity as well as at law.[155] If severance does take place, a purchaser will not be concerned with it unless a restriction is entered. It can be seen from this that to affect a purchaser, severance already requires some formality and that it would therefore cause little difficulty to insist that all severance be done by written notice.

16.13 As between the joint tenants, we would suggest that such a proposal could cause injustice. They may know nothing about the technicalities of joint tenancy and the right of survivorship. Not knowing it exists, they will not know that they can only end it by written notice if at all. If either has behaved as though the joint tenancy does not exist and treated the property as his own, it seems right that the law should accept that and permit severance through the acts or agreement of the parties, even though this may give rise to problems where the other co-owner does not realise that severance has occurred.

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154 Law of Property (Joint Tenants) Act 1964.

155 Land Registration Act 1925, s.58(3).

16.14 It has been suggested[156] that it should be possible to sever by will. In the situation of matrimonial breakdown, a spouse may be anxious to sever so that, on his or her death, the property can be left to the children. Serving a notice may aggravate negotiations over, for example, access to the children. Two of the methods of severance at present allowed are unilateral, the act treating the interests as severed and the giving of a notice. The other joint tenant is given no choice. However, he will necessarily know that it has happened. Severance by will would be similar. Severance would not, of course, take place until the testator died, and the other joint tenant would then find out. There is the possibility of an unjust result where the two co-owners die at the same time or within a short time of each other and one dies unaware of the severance or unable to change his or her will. It would be necessary to provide that severance by will should be specified and explicit, so that a statement of intention to sever should be a requirement. Severance should not be implied by a gift, for example, of all the residue to a charity, but a gift of "my halfshare of Blackacre" should be sufficiently explicit to sever. There is a theoretical difficulty with severance by will. A will is effective from the moment after the death of the testator, and the right of survivorship operates at the moment of death. There is therefore a danger that a notice of severance in a will comes too late as the right of survivorship divests the estate of the property it is desired to sever. It would therefore be necessary to make provision so that any notice of severance in a will severs the testator's interest before the right of survivorship operates.

Bare trusts

16.15 We suggested earlier that bare trusts of land are a potential source of difficulty in that they do not come within either of the existing statutory systems for trusts of land. We would not suggest any major changes to the existing law. As the bare trustee acts at the direction of

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156 Cretney, Principles of Family Law, 4th ed., 1984, p. 659.

the beneficiary, it would be wrong to impose any additional duties on him. However, where sale of the land is concerned difficulties may arise. Generally the purchaser will obtain a good title free from equitable interest, because the trustee conveys in accordance with the wishes of the beneficiary. However, if the trustee conveys without the knowledge of the beneficiary he may appear to be the sole beneficial owner. In such a case the purchaser, where title is unregistered, will only take free if he purchases for value in good faith and has no notice of the equitable interest. Where title is registered, the purchaser will take free unless the beneficiary has protected his minor interest on the register, or is in actual occupation.[157] It seems to be an underlying principle of the Law of Property Act 1925 that land held on trust should be capable of being conveyed free from beneficial interests whether or not the purchaser has notice of them. This is the reason for the overreaching machinery provided in s.2. We would suggest that bare trusts should be brought within s.2 so that the interests of the beneficiary can be overreached, provided that at least one additional trustee is appointed.

Inadvertent settlements

16.16 Inadvertent settlements fall into two categories. The first are those where the intention is to create some sort of trust or settlement, and the settlor, by failing expressly to subject the land to a trust for sale, brings it within the Settled Land Act 1925. If, as is likely, this is a trust in a will, the executors may not realise the true effect of the provisions and the wrong procedure may be followed, causing problems for subsequent purchasers. This type of inadvertent settlement could be prevented by the adoption of any of the first three proposals, as it would then, in every case, be clear what type of trust had been created. The second type of inadvertent settlement occurs when a person is given the right to reside in a property during his lifetime, and subject to that right the property is conveyed or passes on death to another. At present the

157 Hodgson v. Marks [1971] Ch. 892.

result of such an arrangement may be that the land is settled land under the Settled Land Act 1925, and the person with the right of residence is the tenant for life with full powers of disposition and management.[158] This result may be thought to be unsatisfactory, as there was no intention to confer such an extensive interest on the tenant for life.[159] However, these cases should not necessarily be seen as wrongly decided. As Megarry and Wade put it, "it has to be remembered that the deliberate policy of the Act is that the statutory powers must always be available, so that the land is not sterilised, and that these powers cannot be restricted or fettered, whatever the settlor's intentions. This policy may naturally produce unintended results, but that is not necessarily a good reason for excluding a case from the purview of the Act."[160]

16.17 We would suggest that there is no simple answer to this problem. However, a useful approach might be to say that the effect of a provision conferring rights of residence should depend on whether it appears, from the documents or from extrinsic evidence, that the settlor intended to give the person an interest in the land. If it does so appear then we would suggest that, rather than bring the land within the Settled Land Act 1925, the land should either be held under the new trust of land outlined in Proposal I, or be held on trust for sale, any sale to be subject in either case to the consent of the person entitled to reside so long as he or she continues to be in residence. By this means there would be someone, namely the trustees, who could deal with the land, the person with a right of residence would have a considerable degree of protection, and a result would be achieved which would seem to accord to some

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158 Re Duce and Boots Cash Chemists (Southern) Ltd [1937] Ch. 642, Bannister v. Bannister [1948] 2 All E.R. 133, Binions v. Evans [1972] Ch. 359.

159 Griffiths v. Williams [1978] E.G.D. 919.

160 Megarry and Wade, 5th ed., 1984, pp. 349-350, footnotes omitted.

extent with the intentions of the person who gave the right of residence (although it may be that he did not also intend to give any interest in the proceeds of sale once the land is sold).

16.18 Where no interest in land was given, the courts could invoke the developing area of licences (a full discussion of which is outside the scope of this paper), in order to protect the occupier.[161]

CONCLUSION

17.1 We would emphasis that any conclusions drawn in this paper are provisional only. There is little or no published information available as to the extent to which the Settled Land Act 1925 is still in use either for existing settlements or for the creation of new ones, and it may be that information we receive in response to this paper will reveal a picture different from that which we envisage. However, our provisional view is that the form of settlement provided by the Settled Land Act 1925 is excessively complex and no longer necessary. Whether it should be replaced entirely by a new trust with power to sell or by the trust for sale (i.e. Proposals I or II) is a question on which our views are still more tentative, although at present we have some preference towards the former solution. We are not yet persuaded that a new form of co-ownership as set out in Proposal IV is necessary as we consider it may simply add more complication to an already elaborate system. However, we are aware that the proposal does have attractions and we look forward to receiving views on it. We hope that discussions of the structural reforms set out in the first four proposals will not prevent discussion of Proposal V. Although not proposing one coherent reform, the matters set out there, such as severance, and declarations of the equitable interest,

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161 See the judgment of Lord Denning in Binions v. Evans. For further discussion of licences see Megarry and Wade, 5th ed., 1984, pp. 798-808, esp. 807-808, and Hanbury and Maudsley, 12th ed., 1985, pp. 833-868, esp. pp. 863-864.

are important and problems in those areas may have a practical effect on significant numbers of people. Our suggested solutions may not be the right ones, and again we look forward to receiving comments, criticisms and alternative proposals.

APPENDIX A

REFERENCES

Books

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Benas, "The mending of the rents in the settled land curtain", (1947) 11 Conv. (N.S.) 159.

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Friend and Newton, "Undivided shares and trusts for sale - a draftsman's error?" [1982] Conv. 213.

Garner, "Reforms of the land law - Northern Ireland style", (1971) 35 Conv. (N.S.) 92.

enables a child to retain his links with all his family and his identity as a member of that family.

3.14 The custodianship scheme, when it comes into force,[21] will have some of the advantages over adoption which guardianship already has. However, it is designed for people who have already been looking after a child for some time (three months in the case of a relative or step-parent and a total of twelve months in other cases)[22] and will not be suitable for cases where a change of home is necessitated by a parental death. There are also advantages in the appointment of guardians who have almost all the powers and responsibilities of parents, including the power to decide whether or not a child should be adopted. Hence, although, as we later explain, we can see scope for harmonising and rationalising the guardianship and custodianship schemes, we do not think that the latter will provide an effective substitute for the former.

3.15 Many of the arguments above apply with particular force only when both parents are dead. Where one is still alive, there is no legal vacuum of responsibility for the child's upbringing and to supply a person to share that responsibility with the surviving parent may be productive of just that

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21 On 1 December 1985; Hansard (H.C.) 13 May 1985, Vol. 79, Written Answers, col. 36.

22 Children Act 1975, s. 33(3), para. 1.21 and Appendix A. Where there is a surviving parent the period is three years unless the parent consents.

APPENDIX B

CONTENTS

Settled Land Act 1925

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Trustee Act 1925

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Law of Property Act 1925

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ss. 34 - 36

Administration of Estates Act 1925

s. 33
s. 39

What constitutes a settlement

1.- (1). Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments and land, after the commencement of this Act, stands for the time being -

(i) limited in trust for any persons by way of succession; or

(ii) limited in trust for any person in possession -

(a) for an entailed interest whether or not capable of being barred or defeated;

(b) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(c) for a base or determinable fee or any corresponding interest in leasehold land;

(d) being an infant, for an estate in fee simple or for a term of years absolute; or

(iii) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or

(iv) ...

(v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same;

creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires:

Provided that, where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires.

(2) Where an infant is beneficially entitled to land for an estate in fee simple or for a term of years absolute and by reason of an intestacy or otherwise there is no insstrument under which the interest of the infant arises or is acquired, a settlement shall be deemed to have been made by the intestate, or by the person whose interest the infant has acquired.

(3) An infant shall be deemed to be entitled in possession notwithstanding any subsisting right of dower (not assigned by metes and bounds) affecting the land, and such a right of dower shall be deemed to be an interest comprised in the subject of the settlement and coming to the dowress under or by virtue of the settlement.

Where dower has been assigned by metes and bounds, the letters of administration or probate granted in respect of the estate of the husband of the dowress shall be deemed a settlement made by the husband.

(4) An estate or interest not disposed of by a settlement and remaining in or reverting to the settlor, or any person deriving title under him, is for the purposes of this Act an estate or interest comprised in the subject of the settlement and coming to the settlor or such person under or by virtue of the settlement.

(5) Where-

(a) a settlement creates an entailed interest which is incapable of being barred or defeated, or a base or determinable fee, whether or not the reversion or right of reverter is in the Crown, or any corresponding interest in leasehold land; or

(b) the subject of a settlement is an entailed interest, or a base or determinable fee, whether or not the reversion or right of reverter is in the Crown, or any corresponding interest in leasehold land;

the reversion or right of reverter upon the cesser of the interest so created or settled shall be deemed to be an interest comprised in the subject of the settlement, and limited by the settlement.

(6) Subsection (4) and (5) of this section bind the Crown.

[(7) This section does not apply to land held upon trust for sale.]

NOTES

Words omitted repealed by the Married Women (Restraint upon Anticipation) Act 1949, s. 1(4), Sched. 2; amendment in square brackets made by the Law of Property (Amendment) Act 1926, s 7, Sched.

Restrictions on dispositions of settled land where trustees have not been discharged.

18.-(1) Where land is the subject of vesting instrument and the trustees of the settlement have not been discharged under this Act, then-

(a) any disposition by the tenant for life or statutory owner of the land, other than a disposition authorised by this Act or any other statute, or made in pursuance to any additional or larger powers mentioned in the vesting instrument, shall be void, except for the purposes of conveying or creating such equitable interests as he has power, in right of his equitable interests and powers under the trust instrument, to coveny or create; and

(b) if any capital money is payable in respect of a transaction, a conveyance to a purchaser of the land shall only take effect under this Act if the capital money is paid to or by the direction of the trustees of the settlement or into court; and

(c) notwithstanding anything to the contrary in the vesting instrument, or the trust instrument, capital money shall not, except where the trustee is a trust corporation, be paid to or by the direction of fewer persons than two as trustees as of the settlement.

(2) The restrictions imposed by this section do not affect-

(a) the right of a personal representative in whom the settled land may be vested to convey or deal with the land for the purposes of administration;

(b) the right of a person of full age who has become absolutely entitled (whether beneficially or as trustee for sale or personal representative or otherwise) to the settled land, free from all limitations, powers and charges taking effect under the trust instrument, to require the land to be conveyed to him;

(c) the power of the tenant for life, statutory owner, or personal representative in whom the settled land is vested to transfer or create such legal estates, to take effect in priority to the settlement, as may be required for giving effect to any obligations imposed on him by statute, but where any capital money is raised or received in respect of the transaction the money shall be paid to or by the direction of the trustees of the settlement or in accordance with an order of the court.

Infants, how to be affected

26.- (1) Where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute or would if of full age be a tenant for life of or have the powers of a tenant for life over settled land, then, during the minority of the infant-

(a) if the settled land is vested in a personal representative, the personal representative, until a principal vesting instrument has been executed pursuant to the provisions of this Act; and

(b) in every other case, the trustees of the settlement;

shall have, in referene to the settled land and capital money, all the powers conferred by this Act and the settlement on a tenant for life, and on the trustees of the settlement.

(2) If the settled land is vested in a personal representative, then, if and when during the minority the infant, if of full age, would have been entitled to have the legal estate in the settled land conveyed to or otherwise vested in him pursuant to the provisions of this Act, a principal vesting instrument shall, if the trustees of the settlement so require, be executed, at the cost of the trust estate, for vesting the legal estate in themselves, and in the meantime the personal representative shall, during the minority, give effect to the directions of the trustees of the settlement, and shall not be concerned with the propriety of any conveyance directed to be made by those trustees if the conveyance appears to be a proper conveyance under the powers conferred by this Act or by the settlement, and the capital money, if any, arising under the conveyance is paid

to or by the direction of the trustees of the settlement or into court, but a purchaser dealing with the personal representative and paying the capital money, if any, to him shall not be concerned to see that the money is paid to trustees of the settlement or into court, or to inquire whether the personal representative is liable to give effect to any such directions, or whether any such directions have been given.

(3) Subsection (2) of this section applies whether the infant becomes entitled before or after the commencement of this Act, and has effect during successive minorities until a person of full age becomes entitled to require the settled land to be vested in him.

(4) This section does not apply where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute jointly with a person of full age (for which case provision is made in the Law of Property Act 1925), but it applies to two or more infants entitled as aforesaid jointly, until one of them attains full age.

(5) This section does not apply where an infant would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age, but it applies to two or more infants who would, if all of them were of full age, together constitute the tenant for life or have the powers of a tenant for life, until one of them attains full age.

(6) Nothing in this section affects prejudicially any beneficial interest of an infant.

Effect of conveying legal estate to infant

27.- (1) A conveyance of a legal estate in land to an infant alone, or to two or more persons jointly, both or all of whom are infants, for his or their own benefit shall operate only as an agreement for valuable consideration to execute a settlement by means of a principal vesting deed and a trust instrument in favour of the infant or infants, and in the meantime to hold the land in trust for the infant or infants.

(2) Nothing in this Act prevents an equitable interest in settled land being vested in or transferred to an infant.

(3) ...

NOTE

Words omitted repealed, with saving, by the Family Law Reform Act 1969, s.11(a).

Undivided shares to take effect behind a trust for sale of the land

36.- (1) If and when, after the commencement of this Act, settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares, the trustees of the settlement (if the settled land is not already vested in them) may require the estate owner in whom the settled land is vested (but in the case of a personal representative subject to his rights and powers for purposes of administration), at the cost of the trust estate, to convey the land to them, or assent to the land vesting in them as joint tenants, and in the meantime the land shall be held on the same trusts as would have been applicable thereto if it had been so conveyed to or vested in the trustees.

(2) If and when the settled land so held in trust in undivided shares is or becomes vested in the trustees of the settlement, the land shall be held by them (subject to any incumbrances affecting the settled land which are secured by

a legal mortgage, but freed from any incumbrances affecting the undivided shares or not secured as aforesaid, and from any interests, powers and charges subsisting under the trust instrument which have priority to the trust for the persons entitled to the undivided shares) upon the statutory trusts.

(3) If the estate owner refuses or neglects for one month after demand in writing to convey the settled land so held in trust in undivided shares in manner aforesaid, or if by reason of his being outside the United Kingdom or being unable to be found, or by reason, of the dissolution of a corporation, or for any other reason, the court is satisfied that the conveyance cannot otherwise be made, or cannot be made without undue delay or expense, the court may, on the application of the trustees of the settlement, make an order vesting the settled land in them on the statutory trusts.

(4) An undivided share in land shall not be capable of being created except under a trust instrument or under the Law of Property Act 1925, and shall then only take effect behind a trust for sale.

(5) Nothing in this section affects the priority inter se of any incumrbances whether affecting the entirety of the land or an undivided share.

(6) For the purposes of this section land held upon the statutory trusts shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same, with power to postpone the sale of the whole or any part thereof, and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale, after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the

rights of the persons interested in the settled land [and the right of a person who, if the land had not been made subject to a trust for sale by virtue of this Act, would have been entitled to an entailed interest in an undivided share in the land, shall be deemed to be a right to a corresponding entailed interest in the net proceeds of sale attribute to that share].

(7) The provisions of this section bind the Crown.

NOTE

Addition in square brackets to sub-s. (b) was made by the Law of Property (Entailed Interests) Act 1932, s.1(1).

Prohibition or limitation against exercise of powers void, and provision against forfeiture

106.- (1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted -

(a) purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life or statutory owner to exercise any power under this Act, or his right to require the settled land to be vested in him; or

(b) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position

inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him;

that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same.

(3) Notwithstanding anything in a settlement, the exercise by the tenant for life or statutory owner of any power under this Act shall not occasion a forfeiture.

Protection of purchasers, etc.

110.- (1) On a sale, exchange, lease, mortgage, charge, or other disposition, a purchaser dealing in good faith with a tenant for life or statutory owner shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life or statutory owner, and to have complied with all the requisitions of this Act.

(2) A purchaser of a legal estate in settled land shall not, except as hereby expressly provided, be bound or entitled to call for the production of the trust instrument or any information concerning that instrument or any ad valorem stamp duty thereon, and whether or not he has notice of its

contents he shall, save as hereinafter provided, be bound and entitled if the last or only principal vesting instrument contains the statements and particulars required by this Act to assume that-

(a) the person in whom the land is by the said instrument vested or declared to be vested is the tenant for life or statutory owner and has all the powers of a tenant for life under this Act, including such additional or larger powers, if any, as are therein mentioned;

(b) the persons by the said instrument stated to be the trustees of the settlement, or their successors appearing to be duly appointed, are the properly constituted trustees of the settlement;

(c) the statements and particulars required by this Act and contaiend (expressly or by reference) in the said instrument were correct at the date thereof;

(d) the statements contained in any deed executed in accordance with this Act declaring who are the trustess of the settlement for the purposes of this Act are correct;

(e) the statements contained in any deed of discharge, executed in accordance with this Act, are correct:

Provided that, as regards the first vesting instrument executed for the purpose of giving effect to-

(a) a settlement subsisting at the commencement of this Act; or

(b) an instrument which by virtue of this Act is deemed to be a settlement; or

(c) a settlement which by virtue of this Act is deemed to have been made by any person after the commencement of this Act; or

(d) an instrument inter vivos intended to create a settlement of a legal estate in land which is executed after the commencement of this Act and does not comply with the requirements of this Act with respect to the method of effecting such a settlement;

a purchaser shall be concerned to see-

(i) that the land disposed of to him is comprised in such settlement or instrument;

(ii) that the person in whom the settled land is by such vesting instrument vested, or declared to be vested, is the person in whom it ought to be vested as tenant for life or statutory owner;

(iii) that the persons thereby stated to be the trustees of the settlement are the properly consituted trustees of the settlement.

(3) A purchaser of a legal estate in settled land from a personal representative shall be entitled to act on the following assumptions:-

(i) If the capital money, if any, payable in respect of the transaction is paid to the personal representative, that such representative is acting under his statutory or other powers and requires the money for purposes of administration;

(ii) If such capital money is, by the direction of the personal representative, paid to persons who are stated to be the trustees of a settlement, that such persons are the duly constituted trustees of the settlement for the purposes of this Act, and that the personal representative is acting under his statutory powers during a minority;

(iii) In any other case, that the personal representative is acting under his statutory or other powers.

(4) Where no capital money arises under a transaction, a disposition by a tenant for life or statutory owner shall, in favour of a purchaser of a legal estate, have effect under this Act notwithstanding that at the date of the transaction there are no trustees of the settlement.

(5) If a conveyance of or an assent relating to land formerly subject to a vesting instrument does not state who are the trustees of the settlement for the purposes of this Act, a purchaser of a legal estate shall be bound and entitled to act on the assumption that the person in whom the land was thereby vested was entitled to the land free from all

limitations, powers, and charges taking effect under that settlement, absolutely and beneficially, or, if so expressed in the conveyance or assent, as personal representative, or trustee for sale or otherwise, and that every statement of fact in such conveyance or assent is correct.

Power to delegate trusts during absence abroad

25.- [(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) The persons who may be donees of a power of attorney under this section include a trust corporation but not (unless a trust corporation) the only other co-trustee of the donor of the power.

(3) An instrument creating a power of attorney under this section shall be attested by at least one witness.

(4) Before or within seven days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated) to-

(a) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and

(b) each of the other trustees, if any;

but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

(5) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor].

[(6)] For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

[(7)] The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

[(8)] This section applies to a personal representative, tenant for life and statutory owner as it applies to a trustee except that subsection (4) shall apply as if it required the notice there mentioned to be given-

(a) in the case of a personal representatives, to each of the other personal representatives, if any, except any executor who has renounced probate;

(b) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who together with the person giving the notice constitutes the tenant for life;

(c) in the case of a statutory owner, to each of the persons, if any, who together with the person giving the notice constitute the statutory owner and, in the case of a statutory owner by virtue of section 23(1)(a) of the Settled Land Act 1925, to the trustees of the settlement.

NOTE

Amended by the Powers of Attorney Act 1971, s.9.

Consents to the execution of a trust for sale

26.- (1) If the consent of more than two persons is by the disposition made requisite to the execution of a trust for sale of land, then, in favour of a purchaser, the consent of any two of such persons to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient.

(2) Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not sui juris or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemd to be requisite to the execution of the trust or the exercise of the power; but the trustees shall, in any such case, obtain the separate consent of the parent or testamentary or other guardian of an infant or of the ... receiver (if any) of a [person suffering from mental disorder].

[(3) Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of a dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with.

In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this subsection shall not aply unless the contrary intention appears in the disposition creating the trust.]

(4) This section applies whether the trust for sale is created before or after the commencement or by virtue of this Act.

NOTES

Sub-s.(2): amended by the Mental Health Act 1959, s.149(1), Sched. 7, Part I.

Sub-s.(3): substituted by the Law of Property (Amendment) Act 1926, s.7, Sched.

Purchaser not to be concerned with the trusts of the proceeds of sale which are to be paid to two or more trustees or to a trust corporation

27.- (1) A purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale (whether made to attach to such proceeds by virtue of this Act or otherwise), or affecting the rents and profits of the land until sale, whether or not those trusts are declared by the same instrument by which the trust for sale is created.

[(2)] Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where the trustee is a trust corporation, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.]

NOTE

Sub-s.(2): substituted by the Law of Property (Amendment) Act 1926, s.7, Sched.

Powers of management, etc., conferred on trustees for sale

28.- (1) Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act 1925, including in relation to the land the powers of management conferred by that Act during a minority [and where by statutute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner, or trustees of the settlement]: and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale.

All land acquiried under this subsection shall be conveyed to the trustees on trust for sale.

The powers conferred by this subsection shall be exercised with such consents (if any) as would have been required on a sale under the trust for sale, and when exercised shall operate to overreach any equitable interests or powers which are by virtue of this Act or otherwise made to attach to the net proceeds of sale as if created by a trust affecting those proceeds.

(2) Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any

part thereof may be liable to be set aside as capital money under the Settled Land Act 1925 in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested.

(3) Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares (whether or not such shares may be subject to a derivative trust) the trustees for sale may, with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale:-

(a) partition the land remaining unsold or any part thereof; and

(b) provide (by way of mortgage or otherwise) for the payment of any equality money;

and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any legal mortgage created for raising equality money) to persons of full age and either absolutely or on trust for sale or, where any part of the land becomes settled land, by a vesting deed, or partly in one way and partly in another in accordance with the rights of the persons interested under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given:

Provided that-

(i) If a share in the net proceeds belongs to a [person suffering from mental disorder], the consent of his ... receiver shall be sufficient to protect the trustees for sale:

(ii) If a share in the net proceeds is affecsted by an incumbrance the trustees for sale may either give effect thereto or provide for the discharge thereof by means of the property allotted in respect of such share, as they may consider expedient.

(4) If a share in the net proceeds is absolutely vested in an infant, the trustees for sale may act on his behalf and retain land (to be held on trust for sale) or other property to represent his share, but in other respects the foregoing power shall apply as if the infant had been of full age.

(5) This section applies to dispositions on trust for sale coming into operation either before or after the commencement or by virtue of this Act.

NOTES

Sub-s (1): amended by the Law of Property (Amendment) Act 1926, s.7, Sched.

Sub-s (3): amended by the Mental Health Act 1959, s. 149(1), Sched. 7, Part I.

Delegation of powers of mnagement by trustees for sale

29.- (1) The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale whether by this Act or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period: and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.

(2) Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power.

(3) The persons delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee.

(4) Where, at the commencement of this Act, an order made under section seven of the Settled Land Act 1884 is in force, the person on whom any power is thereby conferred shall, while the order remains in force, exercise such powers in the names and on behalf of the trustees for sale in like manner as if the power had been delegated to him under this section.

Powers of court where trustees for sale refuse to exercise powers

30. If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit.

Effect of future dispositions to tenants in common

34.- (1) An undivided share in land shall not be capable of being created except as provided by the Settled Land Act 1925 or as hereinafter mentioned.

(2) Where, after the commencement of this Act, land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall (notwithstanding anything to the contrary in this Act) operate as if the land had been expressed to be conveyed to the grantees, or, if there are more than four grantees, to the four

first named in the conveyance, as joint tenants upon the statutory trusts hereinafter mentioned and so as to give effect to the rights of the persons who would have been entitled to the shares had the conveyance operated to create those shares:

Provided that, where the conveyance is made by way of mortgage the land shall vest in the grantees or such four of them as aforesaid for a term of years absolute (as provided by this Act) as joint tenants subject to cesser on redemption in like manner as if the mortgage money had belonged to them on a joint account, but without prejudice to the beneficial interests in the mortgage money and interest.

(3) A devise bequest or testamentary appointment, coming into operation after the commencement of this Act, of land to two or more persons in undivided shares shall operate as a devise bequest or appointment of the land to the trustees (if any) of the will for the purposes of the Settled Land Act 1925 or, if there are no such trustees, then to the personal representatives of the testator, and in each case (but without prejudice to the rights and powers of the personal representatives for purposes of administration) upon the statutory trusts hereinafter mentioned.

(4) Any disposition purporting to make a settlement of an undivided share in land shall only operate as a settlement of a corresponding share of the net proceeds of sale and of the rents and profits until sale of the entirety of the land.

Meaning of the statutory trusts

35. For the purposes of this Act land held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trusts to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and

other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land [and the right of a person who, if the land had not been made subject to a trust for sale by virtue of this Act, would have been entitled to an entailed interest in an undivided share in the land, shall be deemed to be a right to a corresponding entailed interest in the net proceeds of sale attributable to that share].

[Where-

(a) an undivided share was subject to a settlement, and

(b) the settlement remains subsisting in respect of other property, and

(c) the trustees thereof are not the same persons as the trustees for sale,

then the statutory trusts include a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other capital money attributable to the share to the trustees of the settlement to be held by them as capital money arising under the Setled Land Act 1925].

NOTES

First amendment made by the Law of Property (Entailed Interests) Act 1932, s.1; second amendment made by the Law of Property (Amendment) Act 1926, s.7, Sched.

Joint tenancies

36.- (1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.

(2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants:

Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.

[Nothing in this Act affects the right of a survivor of joint tenants, who is solely and benefically interested, to deal with his legal estate as if it were not held on trust for sale.]

(3) Without prejudice to the right of a joint tenant to release his interest to the other joint tenants no severance of a mortgage term or trust estate, so as to create a tenancy in common, shall be permissible.

NOTE

Sub-s (2): amended by the Law of Property (Amendment) Act 1926, s.7, Sched.

Trust for sale

33.- (1) On the death of a person intestate as to any real or personal state, such estate shall be held by his personal representatives-

(a) as to the real estate upon trust to sell the same; and

(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money,

with power to postpone such sale and coversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason.

(2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased.

(3) During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statutute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature.

(4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate."

(5) The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman.

(6) Nothing in this section affects the rights of any creditor of the deceased or the rights of the Crown in respect of death duties.

(7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will.

Powers of management

39.- (1) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have-

(i) the same powers and discretions, including power to raise money by mortgage or charge (whether or not by deposit of documents), as a personal representative had before the commencement of this Act, with respect to personal estate vested in him, and such power of raising money by mortgage may in the case of land be exercised by way of legal mortgage; and

(ii) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale); and

(iii) all the powers conferred by statute on trustees for sale, and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect, or be varied or rescinded by him, and, in the case of a contract entered into by a predecessor, as if it had been entered into by himself.

(2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made.

(3) This section applies whether the testator or intestate died before or after the commencement of this Act.

APPENDIX C

LAW REFORM COMMITTEE, 23RD REPORT

THE POWERS AND DUTIES OF TRUSTEES

PART IX

SUMMARY OF RECOMMENDATIONS

9.1 Only those conclusions which will require some change in the law are set out in this summary.

III Trustees' Duties

Powers and Duties of Investment (paragraphs 3.1-3.25)

(a) Investment in Land (paragraphs 3.1-3.14)

...

6. (iv) the decision in re Power should be reversed and a new statutory power introduced enabling trustees to purchase a residence for occupation by the person entitled to the income on the moneys laid out in the purchase or eligible to have it applied for his benefit; (paragraph 3.5)

7. Trustees should be empowered to make purchases under recommendation 6(iv) above on mortgage. (paragraph 3.11)

...

Duty to Act Unanimously (paragraphs 3.60-3.66)

24. Section 30 of the Law of Property Act 1925 should be extended to allow an application to the court for an order for sale by the trustees even where they are not themselves beneficiaries under the trust. (paragraph 3.64)

...

V Miscellaneous Points (paragraphs 5.1-5.8)

...

37. Legislation should be introduced corresponding to section 36(7) of the Administration of Estates Act 1925 to apply where there has been a conveyance of a legal estate not expressly made subject to the trust for sale. (paragraph 5.6)

...

VI Powers and Duties to Charity Trustees (paragraph 6.1-6.6)

...

41. Land held by charitable trustees on a fixed date, which has not already vested in the Official Custodian for Charities or any other corporate body, should vest in the Official Custodian for Charities. The trustees should then be empowered to convey the legal estate on his behalf under the provisions of section 17(2) of the Charities Act 1960. (paragraph 6.3).

...

VIII Settled Land (paragraphs 8.1-8.11)

52. A tenant for life of settled land should be empowered to grant a lease of that land or any part of it at a rent initially ascertained by arbitration or valuation, or any other generally recognised method of arriving at the best rent. (paragraph 8.4)

53. A tenant for life should be given statutory authority to grant concurrent leases. (paragraph 8.5).

54. Section 41 of the Settled Land Act 1925 should be amended to give the tenant for life the power to grant ordinary leases of 99 years. (paragraph 8.6).

55. Trustees of a settlement should be empowered to require a tenant for life to obtain valuations in respect of transactions under section 101 of the Settled Land Act 1925 so enabling them to control transactions with the settled land more effectively. (paragraph 8.9).

56. Section 51 of the Settled Land Act 1925 should be amended so as to enable the tenant for life of a settlement to grant options at a price to be fixed by valuation, arbitration or any other generally recognised method. (paragraph 8.10).

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